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[illegible] Plaintiff in Error,

vs.

The Mutual Life Insurance Company of New York, Defendant in Error.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT. IN ERROR TO THE CIRCUIT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

PAPER BOOK OF DEFENDANT IN ERROR.

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For Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

[No. 16,214.]

A. Howard Ritter, Executor of William M. Runk, deceased, Plaintiff in error,

vs.

Mutual Life Insurance Company of New York, Defendant in error.

October Term, 1897.

No. 142.

ON WRIT OF *Certiorari* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

I. COUNTER STATEMENT OF FACTS.

In his history of the case, the appellant makes certain statements which do not accord with the facts as understood by the appellee. It is certainly incorrect to say that "the defendant "failed to adduce evidence upon which on this issue" (the obtaining of the policies by Runk, with a fraudulent intent to kill himself for the benefit of his creditors and of his family) "the jury could have properly found a verdict in its favor." It is equally incorrect to say that "the defense was then shifted "to the bald proposition of law that the suicide of Mr. Runk, "without any express clause to that effect, avoided the policy "unless the plaintiff proved that Runk was insane," and that

" the court, expressing great doubt as to the correctness of the " ruling, sustained this proposition."

It is said, without warrant, that " in the charge of the court " the definition of insanity was drawn so narrowly, the burden " of proving insanity was placed with such emphasis upon the " plaintiff, and the comments of the learned judge upon the " evidence were so adverse, that the jury found a verdict for " the defendant."

It is true that after the court had refused to permit the defendant to put in evidence the application signed by Runk, because of its non-attachment to the policy, as required by the Pennsylvania statute of 1881, it became impossible to defend upon what was therein contained, viz.: " I also warrant and " agree that I will not die by my own act, whether sane or " insane, during the said period of two years." This refusal was made under the following state of facts:—

The appellee was a New York corporation which promised to pay " at its home office in the State of New York " upon the death of Runk, in consideration of a recited annual premium, the first being paid in advance and the succeeding ones to be paid " thereafter to the company at its home office in " the city of New York on the tenth day of November in " every year during the continuance of this contract." The policy was thus attested:—

In Witness Whereof, The said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary at its office in the city of New York.

The appellee, in New York, accepted the risk, and mailed the policy to its general agent. Though it was argued, on its behalf, that the contract was a New York contract, delivered in New York, and to be performed in New York, the learned trial judge held to the contrary.

Two defenses, however, were left which, from beginning to end, were urged by the appellee with as much force of presentment as was within the ability of its counsel. From the beginning it was claimed there could be no recovery by the executor of the insured upon the policies, if the latter,

whilst of sound mind, deliberately killed himself. The evidence of unsoundness of mind was ridiculously meagre. No jury, not actuated by sympathy, could possibly have found such unsoundness from the testimony. The only witnesses called by the appellant to establish it, were the wife and sister in law, who proved, practically, nothing. In reply to a question from the learned trial judge, the wife thus answered (Record, page 122):—

> Q. It might be interesting to know whether you formed this opinion of his mental condition before his death? A. I noticed many things strange. Q. You have given us your judgment of his mental condition based on what you observed. Did you form the opinion which you have expressed that his mind was unbalanced before his death or afterwards? A. Afterwards. Q. Then the act of committing suicide had something to do with the conclusion you reached? A. It had.

Out of the large number of people, in Runk's store and elsewhere, who had conversed, and had done business, with him, during the last days of his life, no one was found who ventured to express an opinion that he was insane. The testimony offered by the appellant showed little more than a distraction of manner, which, under the circumstances was most natural. It really established sanity.

It is true the appellee did aver that Runk secured the policies with a fraudulent intent at that time entertained of killing himself in order that his creditors, (the most important of whom was closely related to him), and his family, might thereby profit.

Much evidence to this effect was adduced by the appellee. Under point III. we will state, with more detail, the evidence establishing an intent to commit suicide, existing at the date of the policies.

Whilst it is true the learned trial judge did express his regret that more time was not at his command in which to investigate the important point involved than that afforded in the hurry of the trial, it is also true, that he then reached a conviction so decided, that when the cause came before him for argument upon motion for a new trial, he acquiesced in the suggestion of the learned counsel for the appellant that further discussion would be unnecessary, as his convictions were settled.

II. APPELLEE'S ARGUMENT.

The appellant rests his case upon three points. We maintain the counter propositions, which we state as follows:—

I. There can be no recovery by the executor of an insured, if the latter, being of sound mind, deliberately takes his own life.

II. Insanity was correctly defined by the learned trial judge.

III. There was abundant evidence tending to prove that Runk conceived a design of effecting policies for the benefit of his estate, with the intent, thereafter, to take his own life.

I. There can be no recovery by the executor of an insured, if the latter, being of sound mind, deliberately takes his own life.

We rest this proposition upon three points:—

1. *Death, resulting from a deliberate killing of himself by the insured, if sane, is not within the meaning of the policy.*

2. *A contract providing for a recovery in case of such death, would be against the policy of the law.*

3. *The deliberate killing of himself by the insured, if sane, is fraudulent,* quâ *the insurer.*

1. *Death, resulting from a deliberate killing of himself by the insured, if sane, is not within the meaning of the policy.*

Life insurance is a risk of the duration of the life of the insured assumed by the insurer, who, in consideration of a sum to be paid to it for an uncertain time, agrees to pay a fixed sum, upon the death of the insured, to his personal representatives or nominees. If the life of the insured proves a long one the insurer wins. If is not a long one it loses. Apprized by the tables of mortality, the insurer is able to form a fair judgment

as to what it will be likely to receive in the way of premiums. Upon these tables it rests its chances of success. The life of any one person insured, through accident or disease, may not reach the average; but in the case of many persons there will be an average duration of life. No insurer would be willing to take the chance of longevity if it understood that the insured, by taking his own life, could, at any time, turn an uncertainty into a certainty, to its injury and to the benefit of his estate.

The insurance contract is made by two persons, one of whom, the insured, desires to provide against the early occurrence of an uncertain event, the termination of his life, and the other of whom, the insurer, takes the chance of such termination, by charging a sum based upon an average of longevity. Each of the parties thereto takes a chance. If, however, the insured by his own deliberate act, not resulting from mental disease, can, at any moment, end his own life, the insurance may prove to be one, not against the chance that he will not live, but against what he may make a certainty. The insured fears a speedy death. The insurer hopes for a long life. The insurance contract is, therefore, the result of the apprehensions of the insured and of the hope of the insurer. It is not probable that any contract would be made if the insured should say to the insurer, "As I may become tired of life, and "may determine hereafter to kill myself, I wish to insure a "provision for my family." Each party is moved by the idea that profit will result to him or to it, as the life may fall short of, or exceed, an average.

The reasons which may move a sane man to kill himself are unknown. The obligation to pay will result, if deliberate suicide be insured against, whenever the insured determines to die. No tables covering the risk that he may make the insurance money immediately payable can be formulated, because such risk depends, not upon tables of mortality, but upon the voluntary action of one who will thereby profit pecuniarily. Insurance against suicide resulting from insanity rests upon a different basis, because such suicide is the result of mental disease, and the percentage of deaths likely thus to occur can

be estimated as well as can the deaths likely to result from physical disease.

Can we believe that any insurance company would enter into a contract with a would-be insurer against death resulting from his suicide whilst sane? If asked to make such a contract it would investigate, not so much the tables of mortality, as the life, habits, financial, and social, condition, of the party applying. It would consult, not the Carlisle tables, but detectives.

The death which is insured against, is one which may result from mental or physical disease, not from the deliberate purpose of a sane person.

In this connection it may be well to refer to what is said by the appellant, in criticism of Judge Butler's charge "that every "contract of life insurance contains an implied condition that "the insured will not intentionally terminate his life, but that "the insurer shall have the benefit of the chances of its con- "tinuance until terminated in the natural, ordinary course of "events. It is on these chances that the premium is based."

The appellant quotes (Brief, 15) Estabrooke *vs.* Union Mutual Life Ins. Co., 54 Maine, 224; Bliss on Life Insurance, section 239; and Breasted *vs.* Farmers' Loan & Trust Company, 4 Hill (N. Y.), 73; but in these cases reference is made to suicide resulting from insanity. Inasmuch as insanity is a mental disease, the chances of its occurrence can be ascertained and calculated. There is no statement by any text-book writer, or judge, to the effect that the chance of a sane man committing suicide may be, or ever has been, calculated.

The appellant refers to the fact that in insurance policies, where an exception is made in case of self destruction it is usual to add the words "sane or insane." Even if the insurer desires merely to exempt itself from responsibility in case of suicide by a "sane" man, it knows that to secure this end it is necessary to except self destruction, whether the insured be "sane or insane," because the fact of insanity must be left to a jury, with the chance of a verdict in favor of the estate, whether the suicide was "sane or insane."

In inserting the clause usually found in policies, insur-

ance companies manifest no belief that intentional destruction by a sane man does not avoid the policy, but also guard themselves against the effect of decisions holding that the avoidance will not occur in the case of policies owned by assignees. The insertion by the appellant, of the clause referred to, in all policies, is to avoid liability, in case of such intentional self destruction by a sane person, without danger of an anti-sympathetic verdict, and without regard to the ownership of the policy. A general form of policy being deemed desirable, the clause is inserted, upon which the appellant comments, in all cases, even though it will be superfluous if the policy be retained by the person committing suicide.

The late Arthur Biddle, in his work on Insurance, section 4, defines insurance to be:—

> An agreement by the insurer to pay to the insured or his nominee a specified sum of money, either on the death of a designated life or at the end of a certain period, provided the death does not occur before, in consideration of the present payment of a fixed amount, or of an annuity till the death occurs or the period of insurance is ended.

In note 5 to that section Mr. Biddle quotes the definition of Baron Parke:—

> A mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of the life; and, when once fixed, it is constant and invariable.

He further quotes from Parke on Insurance, defining life insurance to be a contract—

> By which the underwriter, for a certain sum, proportioned to the age, health, profession and other circumstances of that person whose life is the object of insurance, engages that the person shall not die within the time limited in the policy; or, if he do, that he will pay a sum of money to him in whose favor the policy was granted.

The same text writer further quotes Bunyon as defining life insurance to be—

> A contract in which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum or certain periodical payments by another.

In Comm. *vs.* Wetherbee, 105 Mass., 149, 160, life insurance is defined to be—

> An agreement by which one party, for a consideration (which is usually paid in money, either in one sum or at different times during the continuance of the contract of the risk), promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest.

In Scot. Widows' Fund *vs.* Buist, 3 C. S. C. (4th series), 1878, page 1081, Right Hon. John Inglis defines life insurance to be—

> A mutual contract, by which the insurance company or insurance society, on the one hand, come under an obligation to pay a certain sum of money upon the death of the assured, and the assured, on the other hand, becomes bound to pay certain sums, either annually or otherwise, in the name of premiums, and these obligations are counterparts of one another.

Baron Parke, in stating that the sum to be paid by the underwriter is "proportioned to the age, health, profession and "other circumstances of that person whose life is the object of "insurance," excludes any idea of insuring against voluntary, intelligent, self destruction.

The suggestion in Commonwealth *vs.* Wetherbee, that the consideration paid to the insurer induces it to promise to "make a certain payment of money upon the destruction or "injury of something in which another has an interest," excludes the idea of any promise to pay the party interested in, and controlling, the life to be destroyed or injured, in case of voluntary, intelligent, self destruction.

The definition of Justice Inglis contemplates reciprocity under circumstances of uncertainty as to duration of the payments to be made by the insured, and as to the time the insurance money will be payable to his estate. The obligation on the part of the assured to pay, implies a continuance of payment until the occurrence of an event which is not within his control. The insurer has a right to rely upon such continuance.

The contract of insurance is entered into upon the theory that neither the insurer nor the insured can be certain, nor by

anything within the control of either can become certain, of the duration of life. The insurer, by assuming a multitude of risks, through an experience gathered from tables of statistics and otherwise, is enabled to fix upon a rate of premium to be paid to it which will be likely to produce a profit. It contracts with the insured with the obvious intention, not to insure him against the consequences of his own deliberate, voluntary, act, but against an event over which he can have no control. It would be an anomaly to hold that by a contract to pay the insured a certain sum in case of his death, in consideration of payments to be made by him until such death, the insurer means to give the insured a right, at his pleasure, at any time, to change his obligation to pay, into a right to receive.

2. *A contract providing for payment in case of a deliberate killing of himself by the insured, whilst of sound mind, would be against the policy of the law.*

In this connection it may be well to meet some suggestions of the appellant that "the laws as well as public opinion regard "a suicide as an unfortunate rather than a felon;" that the Constitution of Pennsylvania provides that "the estate of such "persons as shall destroy their own lives shall descend or vest, "as in cases of natural death;" and that Mr. Justice Green, of the Supreme Court of Pennsylvania, in Carpenter's Estate, 170 Penna., 203, expressed the opinion of that tribunal that a son convicted of murdering his father was entitled to share in the distribution of the father's estate under the intestate laws.

It does not follow that an act is not a crime, nor even a felony, because of the failure to forfeit the property of the person committing it. The extent of the punishment of the act, depends upon the statute. A greater or less punishment, even where the less punishment involves a failure to forfeit, does not determine the criminality, or lack of criminality, of the act. It may not be amiss to make some reference to the general subject of suicide, and to the manner in which the same has been, and is, regarded, in the past, and in the present.

It is conceded by the appellant that a person who murders the insured cannot recover the amount of the policy in his favor, and yet there is no forfeiture of the murderer's estate. It is said by Bishop in his book on Criminal Law, section 511:—

> Suicide by the English common law is felony. But our law does not, like the English, allow in felony those forfeitures which alone can be inflicted on one whose life is ended; therefore self murder is practically not an offense with us, yet we recognize it as criminal when the opportunity arises indirectly.

Strahan, in his work on Suicide and Insanity, page 197, says:—

> When it came to be seen that the liberty to terminate one's life was not in harmony with the teachings of the Christian Church, the act was forbidden, and pronounced a deadly sin; but so firmly was the custom rooted, that even after repeated denunciation, excuses were made and loopholes discovered for those who transgressed the new law. The Council of Arles, in 452 A. D., made a sweeping condemnation of all suicide, and forbade it under any circumstances; but long after this there were churchmen to be found who argued that suicide was justifiable under certain circumstances. We have seen (*ante*, page 19) that fanatical Christians voluntarily gave up life as late as the twelfth century, and even later.
>
> As the Christian Church spread its benign wing over Europe and took hold upon the nations, it naturally did its utmost to induce governors to legislate in favor of its canons, but it was many centuries before any of the States of Western Europe were induced to recognize self destruction as a crime. It was during the tenth century that the civil law first made suicide a crime in England, and it was not until well on in the thirteenth century that the same course was taken in France. In both England and France, the old Roman system of confiscation of property was adopted, and, as was the case in Rome, the law did not apply to those "driven to the act by ill health or madness." In England, in Henry III.'s time, all the suicide's property, real or personal, escheated to the crown or the lord of the manor; but so far as freehold was concerned, the law soon fell into disuse, and confiscation of the personal estate was the sole civil penalty. This remained the law up till 1870, when all forfeitures for felony were abolished. This law of forfeiture for felony, as applicable to the suicide, was seldom set in motion for many years preceding its repeal; nevertheless, it was the letter of the law up till 1870. In England, at the present time, the suicide suffers no civil disability whatever.

In Greenidge's Infamia in Roman Law (London, 1894, page 73 and note 2) it is said:—

Certain kinds of suicide were always censured by the Roman law and gave rise to a form of condemnation of memory. * * * This discrimination between the motives to suicide was a leading principle in the later Roman law.

In Montesquieu on the Spirit of Laws (book 29, chapter IX.) it is said:—

man, says Plato, who has killed one nearly related to him, that is himself, not by an order of the magistrate, not to avoid ignomy, but through pusillanimity, shall be punished. The Roman law punished this action when it was not committed through pusillanimity, through weariness of life, through impatience in pain, but from a criminal despair. The Roman law acquitted where the Greek condemned, and condemned where the other acquitted. Plato's law was formed upon the Lacedæmonian institutions, where the orders of the magistrate were absolute, where shame was the greatest of miseries, and pusillanimity the greatest of crimes. The Romans had no longer those refined ideas; theirs was only a fiscal law. During the time of the republic there was no law at Rome against suicides. This action is always considered by their historians in a favorable light, and we never meet with any punishment inflicted upon those who committed it. Under the first emperors, the great families of Rome were continually destroyed by criminal prosecutions. The custom was then introduced of preventing judgment by a voluntary death. In this they found a great advantage: they had an honorable interment, and their wills were executed, because there was no law against suicides. But when the emperors became as avaricious as cruel, they deprived those who destroyed themselves of the means of preserving their estates, by rendering it criminal for a person to make away with himself through a criminal remorse.

Montesquieu (book 14, chapter XII.) further says:—

We do not find in history that the Romans ever killed themselves without a cause; but the English are apt to commit suicide most unaccountably; they destroy themselves even in the bosom of happiness. This action among the Romans was the effect of education, being connected with their principles and customs. Among the English it is the consequence of a distemper, being connected with the physical state of the machine, and independent of every other cause. * * * It is evident that the civil laws of some countries may have reasons for branding suicide with infamy; but in England it cannot be punished without punishing the effects of madness.

By the English common law, as we have seen by the quotation from Bishop, self murder was a felony. Though it has

not been in accordance with the spirit of American law to inflict the penalty of forfeiture upon the act, this has not been through an intention to strip suicide of its criminal character, because, as was said in the case of Commonwealth *vs.* Mink, 123 Mass., 426, "it continued to be considered *malum in se* "and a felony."

The repeal by the State of Pennsylvania of the common-law doctrine respecting a forfeiture of the estate in case of felony did not result from a policy peculiar to that State, but from one which was in accord with the general policy of the several Colonies and States, growing out of common conditions. The repeal was not confined to forfeiture in the case of suicides, but was extended to all forfeitures for crime. In some States the repeal was brought about by the mere repudiation of the doctrine by the courts, as one not applicable to the conditions of the State. In no case was the repeal because of reasons in any way applicable to this case.

By the English common law suicide was a felony.

In Bacon's Abridgment (vol. IV., page 196) it is said:—

A person who willfully destroys himself is termed a *felo de se* and is said to be guilty of the worst sort of murder, as he acts against the first principle of reason, which is that of self preservation.

In the same book, page 197, it is said:—

No person can be a *felo de se* who is under the age of discretion or *non compos* at the time he commits the fact.

On page 199 it is said:—

A *felo de se* forfeits all chattels, real or personal, which he hath in his own right, and also all chattels real whereof he is possessed either jointly with his wife or in her right.

Bishop (section 615) says:—

Felony is any offense which by the statutes or by the common law is punishable with death, or to *which the old English law attached the total forfeiture of lands or goods or both*, or which a statute expressly declares to be such.

This forfeiture test, he says:—

Appears to have been the original one to distinguish felony from misdemeanor. To quote from a painstaking writer (1 Gab., Crim. Law),

"The word *felon* is (according to the best opinions) derived from two "northern words, *fee*, which signifies fief, feud or beneficiary estate, and "*lon*, which signifies price or value, and the word felony imports rather "the feudal forfeiture or act by which an estate is forfeited or escheats "to the lord of the fee, than the capital punishment to which lay or "unlearned offenders were formerly liable in all cases of felony." And in illustration of this he mentions suicide and homicide by misadventure or in self defense, both of which were felonies, because followed by forfeiture, although there could be no punishment of death for the former and there was none for the latter.

In 1870, by statute 33 and 34 Vict., c. 23, Parliament abolished the forfeitures, which, as we have seen, had found little favor in this country.

Story, in his Commentaries on the Constitution of the United States (section 1300), says:—

The reasons commonly assigned for these severe punishments beyond the mere forfeiture of the life of the party attainted are these: By committing treason the party has broken his original bond of allegiance and forfeited his social rights. Among these social rights, that of transmitting property to others is deemed one of the chief and most valuable. Moreover, such forfeitures, whereby the posterity of the offender must suffer as well as himself, will help to restrain a man, not only by the sense of his duty and dread of personal punishment, but also by his passions and natural affections, and will interest every dependent and relation he has to keep him from offending. But this view of the subject is wholly unsatisfactory. It looks only to the offender himself, and is regardless of his innocent posterity. It really operates as a posthumous punishment upon them, and compels them to bear not only the disgrace naturally attending upon such flagitious crimes, but takes from them the common rights and privileges enjoyed by other citizens where they are wholly innocent, and however remote they may be in the lineage from the first offender. It surely is enough for society to take the life of the offender as a just punishment of his crime, without taking from his offspring and relatives that property which may be the only means of saving them from poverty and ruin. It is bad policy, too; for it cuts off all the attachment which these unfortunate victims might otherwise feel for their own government, and prepares them to engage in any other service, by which their supposed injuries may be redressed or their hereditary hatred gratified. Upon these and similar grounds, it may be presumed, that the clause (that no attainder of treason should work corruption of blood or forfeiture except during the life of the person attainted) was first introduced into the original draft of the Constitution, and after some amendments it was adopted without any apparent resistance. * * * The history of other countries abundantly proves that one of the strong incentives to prosecute offenses, as treason, has been the

chance of sharing in the plunder of the victims. Rapacity has been thus stimulated to exert itself in the service of the most corrupt tyranny, and tyranny has been thus furnished with new opportunities of indulging its malignity and revenge, of gratifying its envy of the rich and good, and of increasing its means to reward favorites and secure retainers for the worst deeds.

The correctness of these principles, as underlying the policy of the United States, which does away with the law respecting corruption of blood and forfeiture, is recognized by Mr. Bishop, and he adds that—

The Constitutions of some of the States and the statutes of others have interposed to prevent these forfeitures, while in most of them the courts never followed the English doctrine. Resulting from all it has become nearly universal that forfeitures and corruptions of blood, consequent upon attainder for treason or felony, and upon accidental homicide and the like, are unknown in this country.

Kent, in vol. II., page 386, of his Commentaries, says:—

Forfeiture of estate and corruption of blood under the laws of the United States, and including cases of treason, are abolished. Forfeiture of property in cases of treason and felony was a part of the common law, and must exist at this day in the jurisprudence of those States where it has not been abolished by their Constitutions or by statute. Several of the State Constitutions have provided that no attainder of treason or felony shall work corruption of blood or forfeiture of estate except during the life of the offender, and some of them have taken away the power of forfeiture absolutely, without any such exception.

As being among the first, he mentions Pennsylvania, Delaware and Kentucky, and as among the second, he names Connecticut, Ohio, Tennessee, Indiana, Illinois and Missouri.

He continues, though he does not name the States:—

There are other State Constitutions which impliedly admit the existence or propriety of the power of forfeiture by taking away the right of forfeiture expressly in cases of suicide, and in the case of deodand, and preserving silence as to other cases. And in one instance (Maryland) forfeiture of property is limited to the cases of treason and murder.

In North Carolina the English doctrine of forfeiture has never been followed. Said Chief Justice Taylor, in White *vs.* Fort, 3 Hawks. (1824), 264:—

I cannot think that forfeiture has had any force in this State since 1778, when it was declared what part of the common law should be in

force here. It is not probable that a prerogative should be designedly introduced which a most devoted, but at the same time an enlightened, supporter of the throne pronounced an odious one (Lofft 90). It was introduced originally to increase the king's ordinary revenue, a branch of which it constituted; and if such means of increasing the revenue of the State rightfully existed, it would not have been overlooked by the succession of able men, who have filled the office of attorney-general at different periods.

In the case of Commonwealth *vs.* Mink, 123 Mass., page 425, appears the following:—

In the Colony of Massachusetts, by the Body of Liberties of 1641, all lands and heritages were declared to be free, not only from all feudal burdens, but from all escheats and forfeitures upon the death of parents or ancestors, be they natural, casual or judicial, to which later codes, besides inserting the word "unnatural," added "and that forever." The principle thus declared has always been followed in practice, and there has accordingly never been in Massachusetts any forfeiture upon one's death on conviction or suicide, unless under some particular statute creating the crime, of which no instance is remembered.

In section 616 of his work on New Criminal Law, Bishop says: —

Forfeitures and corruptions of blood consequent upon crimes are almost unknown (under our common law); yet in nearly all the States there are felonies, recognized as distinct grades of crime derived from the unwritten law of England. The punishment in this country is neither always nor usually death, and the same is now true also in the mother country.

Guernsey (page 20) says that in Norway the only penalty is that the body is not to be buried in consecrated ground, but this does not apply to a *non compos mentis*, and therefore the law is practically of no effect. He further states (page 33) that "suicide is a crime at common law, therefore no insurance "can be recovered in such cases, unless the party is proved to "be insane at the time of the act."

Guernsey (page 35) says:—

"Dr. Johnson was right when he said in regard to suicides, 'That they "'are often not universally disordered in their intellects, but one passion "'presses so upon them that they yield to it and commit suicide as a pas-"'sionate man will stab another.'"

From the "traité des Assurances Sur La Vie," par Couteau, vol. II. (Paris, 1881), we take the following extracts as to European legislation:—

La loi de 1868 sur les caisses d'assurance créées par l'Etat, dispose dans son article 3 que l'assurance demeure sans effet "lorsque le décès de

"l'assuré, quelle qu'en soit l'époque, résulte de causes exceptionnelles "qui seront définies dans les polices d' assurances."

Et le décret d'administration publique, rendu le 10 avril 1868 pour l'application de cette loi, précise les cas prévus dans son article 16: "Dans le cas où le décès résulte de suicide, de duel ou de condamnation "judiciare, l'assurance demeure sans effet conformément à l'article 3 dé "la loi du 11 juillet 1868." (Page 238.)

Code De Commerce Hollandais, article 307:—

L'assurance est encore nulle, si celui qui a fair assurer sa vie se rend coupable de suicide ou est puni de mort. (Page 238.)

Loi Belge, article 41:—

L'assureur ne répond pas de la mort de celui qui a fait assurer sa vie, lorsque cette mort est le résultat d'une condamnation judiciare, d'un duel, d'un suicide, sauf la preuve que celui-ci n'a pas été volontaire, ou lorsqu'elle a eu pour cause immédiate et directe un crime ou un délit commis par l'assuré et dont celui-ci a pu prévoir les conséquences.

Dans ces divers cas, l'assureur conserve les primes s'il n'y a convention contraire. (Page 238.)

Code Hongrois, article 504:—

A moins que le contraire ne soit expressément stipulé dans le contrat, l'assureur n'est pas tenu au paiement de la somme assurée: 1°. Si l'assureur subit la peine de mort ou trouve la mort en duel ou par le suicide; 2°. si l'assuré meurt à la guerre ou par suite de blessures y recues; 3°. si l'assurance a été prise contre la maladie ou les blessures corporelles et si l'événement dont la survenance forme la condition du paiement s'est produit par la faute de l'assuré ou du bénéficiaire; dans les cas notés 1 et 2, le bénéficiare a le droit de réclamer le reboursement du tiers des primes d'assurance payées.

La loi belge a voulu prévenir la difficulté qui s'etait élevée en France sur la preuve à faire du suicide. Sa rédaction en impose la charge a celui qui prétent que le suicide á été un accident, un fait maladif, un acte involontaire, "sauf la preuve que le suicide n'a pas été volontaire." (Page 239.)

M. Adan, in his "Etude faite en 1870 sur le projet de la "loi belge" (page 10, *et seq.*), cites the project of the Code of Prussia of 1857:—

L'assureur n'est pas tenu au paiement de la somme assurée, lorsque celui qui a fait assurer sa propre vie s'enlève la vie ou est puni de mort, on trouve la mort en duel. (Page 239.)

He cites further:—

L. article 912 du projet de loi générale pour toute l'Allemagne, élaboré par une commission composée de délégués de divers Etats allemands réunis à Nuremberg, conçu comme suit:

. En ce qui concerne les assurances sur la vie, l'assureur n'est déchargé de son obligation au paiement de la somme assurée que dans le cas où celui, sur la vie duquel l'assurance a été prise, subit la peine de mort, trouve la mort en duel ou s'enlève lui-même la vie; dans ce dernier cas, l'assuré pourra prouver qui celui, pour le cas de decès duquel l'assurance a été prise, se trouvait dans un état d'irresponsabilité. Assuré est pris ici dans le sens de béneficiaré.

C'est la doctrine que nous croyons la seule exacte. (Page 239.)

Par sentence du 10 octobre 1863, le Stadtgericht de Berlin déchargeait l'assureur de ses obligations, parce que l'enquête a laquelle il avait été procédé avait révélé que l'assuré s'était intentionnellement donné la mort. (Zeitschrift Wallmann, 3 année, pago 623.) (Page 241.)*

Traité du Contrat D'Assurance Sur La Vie par J. Lefort (Paris, 1894), Tome 2, 50, 57, *et seq.* :—

Suicide. Le contrat d'assurance sur la vie repose sur le hasard. Le sinistre ne peut donner lieu à réparation de la part de la Compagnie d'assurances que s'il est dû à un événement fortuit. La convention intervenue est dépourvue d'effet quand la mort n'est point le résultat d'un fait accidentel, lorsqu'elle est la conséquence d'un acte volontaire. Les polices, dans leur très grande majorité, doivent donc exclure et elles excluent ce cas; l'assurer déclare formellement qu'il entend ne pas répondre des risques de suicide.

L'exclusion du cas où l'assuré se tue expressément édictée par le Code de Commerce italien (art. 450), par celui de l'Espagne (art. 180), ainsi que celui du Protugal (art. 458), par le Code de Commerce hongrois (art. 504), par le Code de Commerce néerlandais (art. 307), par les Codes de Commerce argentin (art. 698) et chilien (art. 575).

Consacrant une jurisprudence antérieure (Bruxelles, 2 juin 1851, Belg. jud., IX, 15—Trib. civ. Bruxelles, 11 Mars 1861 et Trib. comm. Bruxelles, 4 décembre 1862; ibid., XIX 655; III, 1154), la loi belge du 11 juin 1874 (art. 41) déclare que la responsabilité de l'assurer cesse en cas de suicide volontaire. Cette disposition est d'ordre public, comme on l'a dit aux Chambres lors de la discussion de cet article. La loi du 16 mai 1891 sur les assurances, dans le Grand-Duché de Luxembourg excepte le suicide, sauf convention contraire. En Allemagne, il est reconnu également que le contrat perd ses effets contre l'assureur si l'assuré a à s'imputer sa mort prématurée par un suicide. (Page 50.)

Meme si la police est muette sur la déchéance encourue par le fait de la mort volontaire, l'assureur est libéré. A défaut d'une stipulation expresse, il faut suppléer la clause protant annulation. La nature du contrat répugne, en effet, à ce que l'une des parties puisse, à son gré, modifier l'élément aléatoire qui lui sert de base. On doit aller plus loin, et réputer nulle toute espéce de convention maintenant le contrat en cas de suicide; l'ordre public et l'ordre moral s'y opposent, autant que la nature même du contrat qui, encore une fois, a pour but exclusif de garantir contre un évenement imprévu et non pas contre un acte volontaire. (Page 52).

* The above pages, 238, 239, 241, refer to Couteau, vol. II.

The suggestion is an obvious one, that whether or not for a crime an estate shall be forfeited, throws no light upon the question of whether or not, by reason of the crime, an insurance company shall be compelled to pay what was only agreed to be paid in case of involuntary death. Whilst under the common law, which forfeited the estate of the party committing a felony, there could be no recovery in any event by the representatives of the insured, because the insurance could not inure to its benefit, the question remains open, those representatives being allowed to take the whole estate of the insured, whether insurance money is part of such estate in cases where the insured voluntarily and intelligently terminates his own life. Under the common law the question was between the crown and the subject. At the present time the question is one of interpretation of the contract, and, inasmuch as the act upon which the representatives of the assured rest their claim is a crime, or partakes of the nature thereof, it would be against public policy to enable the assured to benefit his estate by the crime itself.

In Pollock & Maitland's History of English Law (vol. II., page 486) it is said:—

> As to suicide Bracton seems to have had many doubts, and at one time he was for giving the name *felo de se* only to a criminal who killed himself in order to escape a worse fate. We think that the practice of exacting a forfeiture of goods in every case in which a sane man put an end to his own life was one that grew up gradually, and that thus the phrase *felonia de se* gained an ampler scope. We have seen before now that a similar forfeiture of the goods of one who dies obstinately intestate was imminent for awhile.

Blackstone, in speaking of suicide, refers to it as so "desper-" ate and wicked an act."

In Pollock & Maitland (page 357) we find the following statement in regard to the case of a "desperate":—

> These stories may be enough to illustrate the prevailing opinion about intestacy. It was not confined to England. What is more peculiar to England is that the prelates firmly established, as against the king and the lay lords, their right to distribute the goods of the intestate for the weal of his soul. It was otherwise in some parts of France, notably in Normandy. The man who had fair warning that death was approaching,

the man who lay in bed for several days, and yet made no will and confession, was deemed to die "desperate," and the goods of the desperate, like the goods of the suicide, were forfeited to the duke. The bishop of Llandaff complained to Edward I. that the magnates in his diocese would not permit him to administer the goods of intestates, and the king replied that he would not interfere with the custom of the country.

The charter of William Penn, which deals merely with the question of forfeiture, is hardly entitled to the weight suggested by the appellant.

We take the following extract from 2 Pennsylvania Colonial Records, page 186, as illustrative of the manner in which suicide was viewed about the time of Penn:—

At a council held at Philadelphia the 6th. Febr. 1704.

Present.

The Honble. John Evans, Esqre., Lieut. Govr.
Edward Shippen
Thos. Story — Esq'rs. — Wm. Trent
Griffith Owen — Jos. Pidgeon &
Caleb Pusey — James Logan.

A letter from Nehem. ffield of the County of Sussex, to the Gov'r, was read, Informing of one John Williams of ye said county, who was found to have committed self murder by hanging himself in his own loft and thereupon craving direction what should be done with ye estate, upon which a debate arose, whether those of the Terrs. have a right now to the privileges of the propts. charter, by the 8th article of which he was pleased to grant away all forfeitures of estate upon self murder, and being argued it was concluded on his point to be the safest method, and thereupon tis ordered that the coroner of the County shall take an inventory of the whole estate of the defunct, both real and personal, and take the same into his possession, or good security for its value from such persons as now have it, and claim any right to it, till such time as ye above said questions shall be decided. * * *

At a council held at Philadia., 6, 1 Mo. 1794.

Present.

The Honble John Evans, Esqr'e Lieut. Govr.
Wm. Clark — Wm. Trent.
Griffith Owens, — Esq'rs.
Richard Hill, — James Logan. * * *

Cornelius Wiltbank, brother in law to Jno. Williams, who hanged himself at Lewis, having waited on the Govr. and acquainted him that he desired and requested letters of administration on the said defuncts estate and the Govr. acquainted him with the orders made concerning that

estate, the 6ix of the last month. The said Corn'll Wiltbank appeared at this Board and pleads that his brother in law was not *compos mentis* at the times of making himself away, that it plainly appears to be so by the inquest then past upon him.

But tis questioned by the board whether that inquest being made by a justice of the county, and no coroner, be valid, and hereupon, tis left to the said Wiltbank and his council to prove that the said inquest is valid in law, and should it be so prov'd that then he further make it appear that by the tenor and words thereof, the defunct was not *compos mentis* in the eye of the law and his estate not forfeited.

Whether suicide be a felony or not, and whether it be punishable by forfeiture or not, it is certain that the act of self destruction, intelligently and deliberately committed by a man of sound mind, is contrary to the public interest. It follows, as a consequence, that compensation for such self destruction is violative of public policy. See Moore *vs.* Woolsey (4 E. & B., 243), quoted *infra.*

In Horn *vs.* Anglo-Australian & Universal Family Ins. Co., 30 Law, J. (Chan.), 511, in which there was no provision against suicide in the policy, it was contended that the contract was void for the reason that the assured had committed the act, although, as it seems, insane. Suicide, it was said, was a felony, and public policy forbade the upholding of the contract. It was held, however, that the insanity of the assured excluded the application of the public policy doctrine, whereas if the assured had been sane, it was intimated, the act would have been a crime and have rendered the policy void.

In Amicable Society *vs.* Bolland (4 Bligh, N. S., 194), commonly called "Fauntleroy's case," a policy was held void for the reason that the assured had suffered death for felony. The argument of counsel for the appellant was as follows:—

Fauntleroy, by the effect of the contract of insurance, became a member of an incorporated partnership, the object of which, according to the recital and substance of the charter, went to provide a maintenance for the widows, children, &c., upon the casualty of death; and it would be a fraud upon the partnership if any partner by his own act could create a demand upon the funds which was never contemplated in the contract. The contract was in the nature of a wager upon an uncertain event. The risk insured was the chance of death in the ordinary course of events. The risk upon which the claim arises is the chance of escape upon the commission of a capital felony, which in effect is not a chance

but a certainty in the eye of the law, and death, which is the punishment, is the act of the guilty party; for the punishment follows as a necessary consequence of the crime, and the criminal must intend the consequence when he does the act. At all events, the risk (if it be one) of death in consequence of the commission of a capital felony is not the risk insured, but a different one, depending on the will of one of the parties to the contract, which cannot be so construed as to leave it in the option of either party to determine the event. The principles of law established in marine insurance are applicable to this case. In policies upon ships, if the loss is not the direct and immediate consequence of the risk insured, or if the owner destroys the ship, or it perishes by his default or in case of smuggling commerce with the king's enemies, &c., nothing can be recovered on the policy. So would it be on policies of insurance against fire, if the house were purposely burnt by the party insured. If insurance against such an event could be deemed a part of the contract, a risk insured within the intention of the parties, then it is an illegal wager, a contract, the performance of which no court of justice will enforce.

On the other side it was argued that it did not follow, of necessity, that the party would be hanged for the felony—he might escape or be pardoned—that the event was not a certainty, but a chance, upon which the policy depended, so that, if Fauntleroy had committed suicide, instead of a crime for which he might or might not suffer death, the claimant would have been deprived of his only ground of argument.

It was also, on the part of the insurer, contended that the claimants, who sued as assignees, could not recover, as their assignor's property vested in the crown by attainder; but it was contended on the other side, that:—

The property in a policy of assurance upon life is a property increasing in value from year to year as the premiums are paid, and it is transmissible and purchased daily as property by assignment, even by the insurance companies themselves. This property was assigned by Fauntleroy before his attainder and before the act of felony, and the society would have purchased the interest of his assignee, at its value, the day before the attainder.

It was decided, without reference to the forfeiture by attainder, that the assignee had no right to recover upon grounds of public policy.

Lord Lyndhurst said:—

Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money year

by year, upon condition that in the event of his committing a capital felony, and being tried, convicted and executed for that felony, his assignees shall receive a certain sum of money, is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract, if available, take away one of those restraints operating on the minds of men against the commission of crimes, namely, the interest we have in the welfare and prosperity of our connections?

Bunyon, commenting upon this case, adds (third edition, page 96):—

It would render those natural affections which make every man desirous of providing for his family, an inducement to crime; for the case may well be supposed of a person insuring his life for that purpose with the intention of committing suicide. For a policy, moreover, to remain in force when death arose from any such cause would be a fraud upon the insurers, for a man's estate would thereby benefit by his own felonious act. Hence the rule of law when there is no condition whatever; but in that case, if the suicide or self destruction takes place when the assured is *insane* and not accountable for his acts, the rule arising from public policy does not apply, and his representatives are entitled to the policy money.

In the Fauntleroy case, the crime and consequent death vitiated the policy; in the present case, the fraud and concurrent death for the same reason had the same effect. It is an elementary principle that fraud vitiates everything. This same law as to public policy applies to prevent a recovery, not only by the beneficiary who has brought about the death of the assured, but also by the assignee *for value* of the beneficiary.

In Cleaver *vs.* Mutual Reserve Life Assn., L. R., 1892, 1 Q. B., 147, a case arising out of the celebrated Maybrick murder, and decided in July, 1891, the solicitor who acted for Mrs. Maybrick on her trial for the murder of her husband, received from her an assignment of certain policies on her husband's life, payable to herself, to secure his fees. He brought the action upon the assignment. The defense was upon the ground of public policy. It was contended by Sir Charles Russell, plaintiff's counsel, that the law did not sustain such a defense, and that the Fauntleroy case (*supra*) did not apply, for the reason that in that case, as in others referred to, "the

"parties suing were representatives of the persons who effected "the policy and then committed suicide or murder, or had de- "signed to do so in order to realize the insurance." But the Maybrick case, he contended, "is wholly different, for it does "not appear that Mrs. Maybrick ever knew of the insurance, "so that it could not have had any connection with the death "of her husband."

Conceding all this, the defense (conducted by Sir Edward Clarke) argued that the principle of the Fauntleroy case was the same, namely, "that public policy must prevent a person "from profiting by his own crime." This was the court's view. "The defense," said Willis, J., "was solely rested on the "ground of public policy. It was an action brought for the "benefit of a murderess to recover money due on the death of "the murdered man, her husband," and "it was impossible to "conceive a stronger case against public policy."

In Armstrong *vs.* Mutual Life Ins. Co. (117 U. S., 600), the court said :—

> It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken.

In thus saying, this court practically adopted the views expressed in the Cleaver cases, for, although in the latter it was the murderer's assignee who was suing, the judge in his opinion expressed his inability to regard the action otherwise than as for the benefit of the murderer, notwithstanding the important fact that the assignment of the policy was executed before the conviction, for a *bona fide* and valuable consideration, viz., for services to be rendered and which were afterwards rendered.

But there is an express recognition of the principles enunciated in the argument of counsel for the insurer in Fauntleroy case, if not an adoption thereof, by the court, in Sup. Com. *vs.* Ainsworth (71 Ala., 436), in these words :—

> In all contracts of insurance there is an implied understanding or agreement that the risks insured against are such as the thing insured, whether it is property or health or life, is usually subject to, and the assured cannot voluntarily and intentionally vary them. Upon principles of public policy and morals, the fraud or the criminal misconduct of

the assured is, in contracts of marine or of fire insurance, an implied exception to the liability of the insurer. (Waters *vs.* The L. Ins. Co., 11 Peters, 213; Citizens' Ins. Co. *vs.* March, 41 Penn., 386; Chandler *vs.* Worchester M. F. Ins. Co., 3 Cushing, 328.) Death, the risk of life insurance, the event upon which insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and consideration of the contract. It cannot be in the contemplation of the parties that the assured, by his own criminal act, shall deprive the contract of its material element, shall vary and enlarge the risk and hasten the day of payment of the insurance money. The doctrine asserted in Fauntleroy's case, that death by the hands of public justice, the punishment for the commission of a crime, avoids a contract of life insurance, though it is not so expressed in the contract, has not, so far as we have examined, been questioned, though the case itself may have led to the very general introduction of the exception into policies. The same considerations in reasoning which supports the doctrines seem to lead, of necessity, to the conclusion that voluntary criminal self destruction, suicide, as defined at common law, should be implied as an exception to the liability of the insurer, or, rather, as not within the risks contemplated by the parties, reluctant as the courts may be to introduce by construction or implication exceptions into such contracts, which usually contain special exceptions.

In Jackson *vs.* Foster (5 Jurist (N. S.), 547, 1247) the same views are substantially adopted.

Upon a similar principle to that which would forfeit a policy for a felonious suicide without an express condition to that effect, a death caused by an abortion voluntarily procured by the assured to be committed upon her, has been held to vitiate the contract on the ground of public policy.

Hatch *vs.* Mutual Life Ins. Co., 120 Mass., 550.

Judge Maule, in the case of Borradaile *vs.* Hunter (5 M. & Gr., 639, 653), construing the effect of a condition vitiating the policy if the assured "should die by his own hand," said: —

To protect the insurers against increase of risk arising out of this temptation is the object for which the condition in question is inserted. It ought therefore to be so construed as to include those cases of self destruction in which, but for the condition, the act might have been committed in order to accelerate the claim on the policy, and to exclude those in which the circumstances, supposing the policy to have been unconditional, would show that the act could not have been committed with a view to pecuniary interest. This principle of construction requires and accounts for the exclusion from the operation

of the condition of those cases falling within the general sense of its words to which it is admitted not to apply, such as those of accident and delirium. To apply it to the present case: It appears by the finding of the jury that the testator voluntarily threw himself into the water, intending to destroy his life, but that at the time he did so he was not capable of judging between right and wrong; and, as a man who drowns himself voluntarily may do it to found a claim on a policy, though he may not think it wrong to do so, or though his mind may be so diseased that he does not know right from wrong—which, as I understand the finding of the jury, was the case with the testator—it seems to me that the object of the condition would not be effected unless it comprehended such a case of self destruction.

It was accordingly held that the policy was avoided.

Judge Erskine in the same case said:—

The act of self destruction should be the voluntary and willful act of a man having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act; and that the question whether at the time he was capable of understanding and appreciating the moral nature and quality of his purpose is not relevant to the inquiry, further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself.

Again, he said:—

The fair inference to be drawn from the nature of the contract would be that the parties intended to include *all willful acts* of self destruction, whatever might be the moral responsibility of the assured at the time; for, although the probable results of bodily disease producing death by physical means may be the fair subjects of calculation, the consequences of mental disorder, whether produced by bodily disease, by external circumstances or by corrupted principle, are equally beyond the reach of any reasonable estimate. And reasons might be suggested why those who have the direction of insurance offices should not choose to undertake the risk of such consequences, even in cases of clear and undoubted insanity. It is well known that the conduct of insane patients is, in some degree, under the control of their hopes and fears, and that especially their affection for others often exercises a sway over their minds where fear of death or of personal suffering might have no influence.

Mr. Cooke, referring to the exception from risk if the assured "should die by his own hand" (page 69), says, in effect:—

The weight of authority is decidedly to the effect that the expression, "die by his own hand," involves not only the idea that the act of self destruction was voluntary, but that it was accompanied with a disability to distinguish right from wrong, or as it has been expressed, to understand its moral aspect and character. That is to say, if the insured vol-

untarily kills himself by shooting himself through the heart, firmly believing that the act of pulling the trigger is morally right, but also fully aware that his death will, in the natural course of things, result from such act, the contract is, according to what we regard as the better view, avoided if it contains the exception in question. But according to the view supported by the weight of authority, it is not avoided, inasmuch as the insured (erroneously) believed his act to be morally right, citing Mutual Co. *vs.* Terry, 15 Wall, 580, 591; Charter Oak Co. *vs.* Rodel, 95 U. S., 232; Manhattan Co. *vs.* Broughton, 109 U. S., 121; Accident Co. *vs.* Crandall, 120 U. S., 527, 531; Conn. Mut. Co., *vs.* Groom, 86 Pa. St., 92; Life Assn. *vs.* Waller, 57 Ga., 533; Phadenhaur *vs.* Germania Co., 7 Heisk (Tenn.), 567; Waters *vs.* Conn. Mut. Co., 2 Fed. Rep., 892; Moore *vs.* Conn. Mut. Co., 1 Flippin, 363; Blackstone *vs.* Standard Co., 74 Mich., 593, 610 (1889, where the authorities are elaborately examined); Schultz *vs.* Ins. Co., 40 Ohio St., 217; New Home Ass. *vs.* Hagler, 29 Ill. App., 437; Scheffer *vs.* National Co., 25 Minn., 534.

The following array of respectable authorities are cited to sustain the view advanced by the author, that the exception from risk if the assured "should die by his own hand" covers all *cases of intentional* self destruction: Borradaile *vs.* Hunter, 5 M. & Gr., 639; also, 5 Scott, N. R., 418; Dormay *vs.* Borradaile, 10 Beavan, 335; Clift *vs.* Schwabe, 3 C. B., 437; Dufaur *vs.* Professional Co., 25 Beavan, 599; Van Zandt *vs.* Mut. Ben. Co., 55 N. Y., 169; Weed *vs.* Mutual Benefit Co., 70 N. Y., 561; Meacham *vs.* N. Y. State Mut. Ben. Assn., 120 N. Y., 237; Dean *vs.* Am. Mut. Assn., 4 Allen (Mass.), 96.

The case of Blackstone *vs.* Insurance, 74 Mich., 593, is a very instructive one. It was decided as recently as 1890, and contains a review of the authorities upon this subject. The policy sued upon, contained a provision against recovery if the insured died *by suicide*, with no such words as "sane or insane" to extend the company's exemption from liability. Judge Long (page 605) said:—

Upon the question of voluntary suicide, intentionally committed by a sane man in the possession of his faculties, knowing how to adapt means to ends, and conscious of the immorality of the act, there is no difference of opinion, and all authorities agree that such self destruction is within the exemption; and all authorities likewise agree that an accidental death, as by taking poison by mistake, or shooting one's self with a pistol, supposing it not to be loaded, or falling from a building, or death happening in any way by the unintended act of the party dying, is not within the exemption. But whether suicide by an insane man is also within the exemption has been the question in dispute, and upon

this two prominent and different doctrines have been maintained. On the one hand it is maintained that if the act be voluntarily done in pursuance of an intelligent purpose, and intentionally and intelligently carried out by the proper adaptation of means to ends, it is suicide on the part of the insured, or death by his own hands, although insanity exists to such an extent that he may not be able to appreciate the moral qualities of the act. On the other hand, it is maintained that, however intelligently the act may be done, if at the time the will be overpowered by an uncontrollable impulse, or the party being unable to appreciate the moral character of the act, it is not within the meaning of the provision.

In support of the first-mentioned doctrine, the learned judge cites *Borradaile* vs. *Hunter* (5 Man. & Gr., 638) and *Dean* vs. *Ins. Co.* (4 Allen, 96), in which, as he says, the Supreme Court of Massachusetts held substantially the doctrine as laid down in the Borradaile case; *Ins. Co.* vs. *Graves* (6 Bush, 268), in which the Supreme Court of Kentucky were divided upon the question of the soundness of the Borradaile case, but agreed that when the suicide was committed during an uncontrollable passion, caused by intoxication, the condition was broken and the policy avoided; Cooper *vs.* Ins. Co., 102 Mass., 127; Van Zandt *vs.* Ins. Co., 55 N. Y., 169.

In support of the second-mentioned doctrine he cites Breasted *vs.* Trust Co. (4 Hill, 73 S. C., 8 N. Y., 299); Eastabrook *vs.* Ins Co. (54 Me., 224); Ins. Co. *vs.* Terry (15 Wall, 580), which he himself approves, and calls the leading case upon the subject and which follows "the New York doctrine" as laid down by Chief Justice Nelson in Breasted *vs.* Trust Co.; Ins. Co. *vs.* Rodel (95 U. S., 237); Ins. Co. *vs.* Broughton (109 U. S., 121); Ins. Co. *vs.* Moore (34 Mich., 45); Waters *vs.* Ins. Co. (2 Fed. Rep., 892); Moore *vs.* Ins. Co. (3 Ins. L. J., 444); Merritt *vs.* Ins. Co. (55 Ga., 103); Phillips *vs.* Ins. Co. (26 La. Ann., 404); Scheffer *vs.* Ins. Co. (25 Minn., 534); Ins. Co. *vs.* Groom (86 Penn., 92); Hathaways' Adm'r *vs.* Ins. Co. (48 Vt., 335).

Continuing, Judge Long (page 610) said:—

The effect of this doctrine is that, in order to work a forfeiture under such a policy on the ground of self destruction, the insured must have had sufficient mental capacity, not only to understand that the act will destroy his life, but also to distinguish its moral quality and consequences—the right and wrong of it—and must perform the act, not under

any uncontrolled impulse resulting from insanity, but voluntarily, with the intent to end his life; in other words, that it must be *an act done with an evil motive*. We think that this doctrine is supported by the great preponderance of authority in this country and must be conceded *to be the prevailing American doctrine;* and it seems to us to be the safer and more reasonable and more consistent doctrine. It agrees with the general rule as to the excusatory feature of insanity in civil as well as in criminal cases. It also operates to prevent forfeiture, which is a favorite principle of an enlightened jurisprudence. Nor can it have any injurious effect, since insurers may always frame such contracts to suit themselves, and may, if they choose, insert express stipulations to the effect that insanity shall not in any case prevent an avoidance by the suicide of the insured.

We give the following extracts from the books on Life Insurance. Mr. Cooke (page 67) says:—

If performance by the insurer is in general terms conditioned on the death of the insured, there seems no valid reason why death by committing suicide should not be included, and such is the general doctrine, citing Darrow *vs.* Family F. Socy., 116 N. Y., 537, 542; Fitch *vs.* Am. Pop. Co., 59 N. Y., 557, 573; Patrick *vs.* Excelsior Co., 67 Barb., 202; Northwestern B. A. *vs.* Wanner, 24 Ill. App., 357; Wells *vs.* Rebstock, 29 Minn., 380. To the contrary, however, Sup. Com. K's. Golden Rule *vs.* Ainsworth, 71 Ala., 436, 447; and see Hartman *vs.* Keystone Co., 21 Pa., 466, 479; and compare Am. Co. *vs.* Isett, 74 Pa., 176. "A *fortiori*," he continues, "is thus true of self destruction by an insane person." (Citing Horn *vs.* Anglo-Aus. Co., 30 L. J. Ch., 510. "But this rule is subject to the reasonable limitation that one effecting the insurance with intent to commit "suicide, and committing suicide in pursuance of such intent, is guilty of "a fraud that will avoid the contract, even though it contain no provision "as to suicide."

Mr. Cooke cites, in support of the limitation, Smith *vs.* National Benefit Society, 123 New York, 85; Moore *vs.* Woolsey, 4 El. and Bl. 243.

It would seem that the fact of the suicide would itself afford the strongest feature of the evidence that the insurance was effected with intent to commit it. How is the intent to be established until the act is committed? Would it lie with the insurer to repudiate the contract before the act? If so, upon what evidence? The correct view seems clearly to be that self destruction by a *sane man* is the consummation of a fraudulent purpose, and, whether that purpose was conceived before, or after, the policy was taken out, is entirely immaterial.

Mr. Bacon, in his work on Benefit Societies and Life Associations, seems to take the same view as Mr. Cooke that suicide is no defense unless it is so stipulated, citing Horn *vs.* Anglo-Aus. Co., 4 L. T. (N. S.), 142, which does not support the statement, but that it is a perfect defense that the policy was taken out with the deliberate purpose of committing suicide. He does not refer to any of the cases cited by Mr. Cooke, saving that of Smith *vs.* Natl. Ben. Socty. (123 N. Y., 91). This case is undoubted authority for the point of vitiation of the policy when taken out with intent to defraud, but it is also entirely consistent with, if not actually in support of, the view, that suicide by a sane person is a defense, whether the intent to commit it arose before, or after, the policy was taken out. To quote from the opinion :—

> Some of this evidence was resisted upon the ground that death by suicide was no defense under the terms of the policy. That is true, but the defense was fraud, and suicide the ultimate agency by which the fraud was accomplished.

Mr. Porter, in his Law of Insurance (pages 129, 130), states the broad doctrine, on the authority of the Fauntleroy case, that if death ensues from self destruction by the insured while sane, the insurer is not liable.

Mr. Blayney, whose work was published in 1837, says (page 70) :—

> It is undoubtedly incumbent on assurance officers to protect themselves against losses which may be occasioned by any unlawful *or fraudulent act of* the assured, but as the cases above alluded to, especially *that of suicide*, usually originate from causes adverse to that of a design upon an assurance officer, namely, aberration of mind, &c., the premiums, he thinks, should be restored.

It will be seen that the author classes fraud with illegality as matter which will avoid the policy.

Mr. Crawley in his work (page 54) says, that the proviso that the policy shall remain in force to the extent of any *bona fide* interest acquired by a third person, is introduced for the benefit of the insured to render the policy marketable (citing Cook *vs.* Black, 1 Ha., 393).

Assignment means assignment by contract, not by operation of law, and the assignee in bankruptcy of the insured has no claim. Jackson *vs.* Foster (5 Jur. N. S., 547, 1247). See Moore *vs.* Woolsey (4 E. & B., 243) as to the rights of third persons.

The first case dealing with the question of the effect of suicide on a life insurance policy containing clauses against it, was Breasted *vs.* The Farmers' Loan & Trust Co. (4 Hill, 74), N. Y., 1843. The policy contained a clause of forfeiture in case the insured died by his own hand. It was held in that case that the insanity of the insured at the time of his death by suicide was no defense. This decision was sustained by the Court of Appeals, when it came up ten years afterwards (8 N. Y., 303), by five judges against three. On this appeal, Borradaile *vs.* Hunter (5 M. & Gr., 639), which was the first English case on a similar question, and was decided in 1843, was cited as establishing that in England it is the law, under this particular form of a policy, in every case of suicide, that whatever may have been the mental condition, if the policy contained a clause which makes it void "if the "assured shall die by his own hand or act," or words to that effect, it becomes void in such case. (See Clift *vs.* Schwab, 3 M. Gr. & S., page 437.)

The principle of the decisions in the English cases is founded upon the right of contracting parties to make any exception they may agree upon at the time of the issuing of the policy, and that it must be strictly construed in favor of public policy.

In Germany and throughout continental Europe (with the exception of France—where the courts have given conflicting decisions as to the construction of the conditions against suicide), the courts coincide with the views expressed in the English decisions and hold the policy void in such cases. There have been many conflicting decisions in American courts on this same subject, but they have not, any of them, gone so far as the English cases.

VanZandt *vs.* Mutual Benefit Life Ins. Co. (55 N. Y., 170) is a very instructive case. It deals with what is left for the jury to decide (see pages 176 and 179 *et seq.*); and with the degree of insanity.

Guernsey, Penal Laws against Suicide (page 39), says:—

The most important decision, and one in which the American doctrine at the present time is plainly laid down to its full extent, has very recently been decided by the Court of Appeals of Maryland. (Knickerbocker Ins. Co. *vs.* Peters, 42 Md., 414.)

It holds that it must be proved that the assured was insane when the act was done.

The apparent conflict among the American adjudication on this point is chiefly caused by the peculiar wording and construction. * * * The current of these decisions when the policy is properly worded is gradually approaching Leon *vs.* American Mutual, 4 Allen (Mass.), 696, and will ultimately be in effect the same as the English decision, for they are the most just to insurers and are according to the common law, and are for the welfare of the community as tending to discourage and prevent self destruction.

Guernsey (page 43) instructively puts his views of the impropriety of allowing any insurance on a life destroyed by suicide as being against public policy.

The appellant concedes that the insured, under a policy of fire insurance, cannot recover for a fire resulting from his own deliberate act; but contends that it is different where the estate of one insured in a life insurance policy, sues in the case of a voluntary destruction of his life by the insured whilst of sound mind. We submit, however, that there is a complete analogy in the two cases. Runk had an insurable interest in his own life similar to that which he held in his own property.

In Conn. Mutual Life *vs.* Schaefer, 94 U. S., 460, this court says:—

In marine and fire insurance the difficulty is not so great, because there insurance is considered strictly as an indemnity, but in life insurance the loss can seldom be measured by pecuniary values. Still, an interest of some sort in the insured life must exist. * * * It is well settled that a man has an insurable interest in his own life.

In May on Insurance, section 7, under the head of "Pur-"pose," we find:—

A distinction has sometimes been taken between marine and other insurances, and life insurance, on the ground that while the former have for their object to indemnify for loss, the latter is an absolute engagement

to pay a fixed sum on the happening of a certain event, without reference to any damage in fact, suffered by the insured in consequence. But this distinction is superficial, and rests rather upon the mode of applying the principles and of determining the amount of indemnity, than upon any difference in the principles themselves. Insurance upon a ship or a house at a fixed valuation, and at an annual premium, until one is lost or the other is burned, is in no way different in principle from the insurance of a life at a fixed valuation and at an annual premium until death. And there may be between the vigor of manhood and the decrepitude of old age the same change in value that the house or the ship may undergo. In the one case, the insurance is against the loss of capital, which produces income; in the other, it is against the loss of faculties, which produce income. There is the same difference, having reference to the question of indemnity, between valued and open policies in both fire and marine insurance that there is between an open policy in either and a policy of life insurance. In open policies the question of the amount of the indemnity is left to be determined when the contingency upon which it becomes due shall have happened, while in valued policies and policies on lives the value of the interest which the insured seeks to protect is agreed upon by the parties and inserted in the policy, and so the amount of indemnity which shall become due on the happening of the given contingency is predetermined. The purpose in all cases is alike—indemnity for the loss of a valuable interest. That in some cases the value is fixed with great precision, while in others it is of such a speculative character as to admit of the greatest latitude of estimate, not to say of conjecture, does not make it the less a valuable interest. There must be this interest to support the contract. This is essential. What it shall be, provided it be valuable, and how its value shall be arrived at, are simply incidental questions; and however they may be answered, do not change the nature of the contract from one of indemnity based upon an interest to be protected, to a mere wager based upon no interest whatever. The analogies between life and marine policies have been matters of frequent judicial observation. When it is said that fire, life and other insurances, where valued policies obtain, are contracts of indemnity, it is simply intended that to support them the insured must have some interest in the thing insured. The amount of this interest, and the amount to be paid in case of loss, may be fixed by arbitrary agreement, even before the loss, according to the modern practice, if not strictly according to the ancient doctrine, of insurance.

In Britton *vs.* The Royal Insurance Co., 4 Foster & Finlayson, 908, Willes, J., says:—

A fire insurance * * * is a contract of indemnity; that is, it is a contract to indemnify the insured against the consequences of a fire, provided it is not willful. Of course, if the assured sets fire to his home, he could not recover. That is clear.

No express exception is necessary in the policy.

In Columbia Insurance Co. *vs.* Lawrence, 10 Peters, 507, the fire policy excepted loss or damage by fire "that may "happen or take place in consequence of any invasion, civil "commotion, riot or any military usurpation." This court, through Mr. Justice Story, said (page 518):—

> The exception, then, may fairly be construed to leave all other losses, except fraudulent losses, within the reach of the policy, upon the known maxim of law that an exception expressly carved out of a general clause leaves all other cases within the scope of the clause. Fraudulent losses are necessarily excepted upon principles of general policy and morals, for no man can be permitted in a court of justice to allege his own turpitude as a ground of recovery in a suit.

If the insured sets fire to the building, that fact is a fraud and avoids the policy. In Wightman *vs.* Western M. & F. Co., 8 Robinson (La.), 442, the defense was that plaintiff set fire. The court said:—

> If the defendants can establish such circumstances as will, according to the established rules of our jurisprudence, fix a fraud upon the plaintiff, it will, in our own opinion, annul the policy.

The Supreme Court of Pennsylvania, in laying down the rule in case the insured burnt the building, held that it was error to instruct the jury that the testimony to establish the fact must be as strong as would be required to convict the assured in a criminal court on a charge of arson. The court referred, by way of analogy, to Continental Co. *vs.* Delpeuch, 82 Pa. St., 235, where it was said:—

> The mere fact of death in an unknown manner creates no legal presumption of suicide. Upon evenly-balanced testimony the law assumes innocence rather than crime. Preponderating evidence is necessary to establish the latter.

One may burn his house at common law, and there is no arson. One may take his own life, and there is no felony. But neither in the first nor in the second case would moneys be recovered from an insurance company.

While insanity is a defense to arson, it is neither a defense in the case of *fire* insurance or of *life* insurance.

In Williams *vs.* Hays, 143 N. Y., 453, it is said:—

It is an unquestioned rule of law that an insurance company cannot successfully defend an action upon its policy to recover for a loss by showing that the insured destroyed the property while insane, or that its destruction was caused by the carele-sness of his agents and servants.

Arson is committed if there be sanity, and there can be no recovery for moneys insured; but there is no arson if there be insanity, and there can be a recovery. So in life insurance. Where attempt at suicide is a felony, insanity is a defense, but a sane attempt is punishable. And there can be a recovery if the death is by the act of an insane person, but not if it be by the act of a sane man.

Williams *vs.* Hays (1894), 143 N. Y., 442, was an action brought by the assignee of a marine insurance company to recover moneys paid by the company on account of the loss of a vessel, alleged to have been caused by the defendant's negligence. The charge of negligence was based upon the following facts: The vessel, having started from the coast of Maine bound south, encountered storms at the outset, and, for two days, defendant was constantly on duty. Becoming exhausted, he went below, leaving the vessel in charge of the mate. He took a large dose of quinine and laid down. The mate, finding that the rudder was broken and useless, called him on deck again. He refused to believe that the vessel was in any trouble, and declined the help of two tugs, the masters of which saw the difficulty under which the vessel was laboring and successively offered to take her in tow, cautioning defendant that she was gradually and certainly, drifting upon the shore. In broad daylight, she did drift upon the shore and became a total wreck. The defendant claimed that from the time he went to his cabin until the vessel was wrecked, he was unconscious from insanity. The case was submitted to the jury on the theory that the defendant, if sane, was guilty of negligence causing the destruction of the vessel, but if insane, was not responsible for the loss through any conduct on his part which, in a sane person, would have constituted such negligence as would have imposed responsibility. A verdict was rendered in favor of

the defendant, and the judgment entered thereupon was affirmed on appeal to General Term. From the General Term judgment an appeal was taken to the Court of Appeals, which reversed and ordered a new trial.

Judge Earl (page 446) said:—

Parsons and Loud had insured their interest in the Phœnix Insurance Company, and it paid them the loss. It thus became subrogated to their claim, if any, against the defendant for his negligence or misconduct in the management of the vessel, and it assigned that claim to the plaintiff.

The important question for us to determine then is whether the insanity of the defendant furnishes a defense to the plaintiff's claim, and I think it does not. The general rule is that an insane person is just as responsible for his torts as a sane person, and the rule applies to all torts, except perhaps those in which malice, and, therefore, intention, actual or imputed, is a necessary ingredient, like libel, slander and malicious prosecution. * * * The liability of a lunatic for his torts, in the opinions of judges, has been placed upon several grounds. The rule has been invoked that when one of two innocent persons must bear a loss, he must bear it whose act caused it. It is said that *public policy requires* the enforcement of the liability that the relatives of a lunatic may be under inducement to restrain him, and that tort feasors may not simulate or pretend insanity to defend their wrongful acts causing damage to others.

Continuing, Judge Earl quotes with approval from Cooley on Torts, in parts, as follows:—

The question of liability in these cases as well as in others, is a question of policy, and it is to be disposed of as would be the question whether the incompetent person should be supported at the expense of the public or of his neighbors or at the expense of his own estate. If his mental disorder makes him dependent, and at the same time prompts him to commit injuries, there seems to be no greater reason for imposing upon the neighbors or the public one set of these consequences rather than the other; no more propriety or justice in making others bear the losses resulting from his unreasoning fury when it is spent upon them or their property than there would be in calling upon them to pay the expense of his confinement in an asylum when his own estate is ample for the purpose.

In pursuance of the judgment of the Court of Appeals a new trial was had. At the second trial the judge directed a verdict for the plaintiff upon the ground that under the principles laid down by the Court of Appeals:—

Assuming that the defendant's condition had been caused by exhaustion in consequence of his efforts to save the ship and the heavy dose of

quinine which he had taken, he was still liable, his act having been such as would be negligent in a sane man.

Judge Ingraham (2 App. Div., N. Y., 185), reviewing the second trial at general term, said :—

This case presents questions about which there has been quite a conflict of judicial opinions. The main question, however, has been settled by the Court of Appeals on a former appeal to that court.

In this connection it is well to notice that three judges dissented from the prevailing opinion of the Appeal Court, viz., Judges Peckham, Gray and O'Brien.

In Cross *vs.* Kent (32 Md., 581), it was said:—

The distinction between the liability of a lunatic or insane person in civil actions for torts committed by him, and in criminal prosecutions, is well defined, and it has always been held, and upon sound reason, that though not punishable criminally, he is liable to a civil action for any tort he may commit.

It was accordingly held that the idiocy, or insanity, of the defendant was not a bar to the action. The action was brought against an insane person for setting fire to a barn belonging to the plaintiff.

There is a great distinction between the cases cited and that of a person setting fire to his own building and seeking afterwards to recover upon fire policies. The distinction is pointed out in the Court of Appeals' opinion above referred to (Williams *vs.* Hays, 143 N. Y., 149), quoting from Karow *vs.* The Continental Ins. Co. (57 Wis., 64), as follows :—

While the burning of his own property by an assured under no restraint of duty and incapable of care, and without any intent or design, does not relieve the company from liability, yet the same act of burning another's property might subject such person to damages therefor, not on the ground of negligence, as that word is usually understood, but, in the language of Chief Justice Gibson, on the principle that where a loss must be borne by one of two innocent persons, it should be borne by him who occasioned it.

Of course, among those whom the court had in mind as being incapable of care and without any design, &c., were insane persons.

In the same opinion, the court, at page 59, say:—

Counsel * * * claims that the burning of the buildings by the assured relieved the company from all liability, regardless of the question whether he was at the time *sane or insane*, and such seems to have been the opinion of the court during a portion of the trial. The question is important and the principal one discussed upon the argument. Counsel on both sides concede their inability to find any adjudicated case directly in point. Upon the part of the plaintiffs it is urged that the case is the same in principle as the liability of a life insurance company, where the insured has committed suicide; and several cases are cited which hold in effect that if the assured was insane at the time of the suicide then the company is liable, otherwise not. On the other hand, it is claimed upon the part of the defense that those cases have no application to fire insurance; that the two classes of contracts are essentially different; that a policy of fire insurance is a contract of indemnity—a contract for compensation for damages actually sustained; whereas a policy of life insurance is a contract to pay a certain sum of money upon the death of a person named, which is sure to happen, and that such payment is to be made regardless of the value or worthlessness of the life insured. Having thus distinguished the two classes of cases, the learned counsel contends that while an insane person cannot be guilty of a crime nor liable for a tort wherein the intent is a necessary ingredient, yet that a lunatic has always been held liable for other torts resulting in damage. In support of this counsel cites several cases, and argues from them that if a lunatic burns the buildings of A. he is liable to A. for the amount of the actual damages sustained; and that since this is so, it must follow that a lunatic cannot burn his own buildings upon which he has previously obtained an insurance, and then turn around and recover of the insurer the damages he has sustained by reason of his own act.

The judge then proceeds to a number of cases bearing upon the principle at great length, and after working out the distinction approved by the New York Court of Appeals, as set forth above, concludes that an insurer is not released from liability because the property was burned by the insured, if the latter, at the time, was insane. But "*it is a maxim*," he says, "of the insurance law of all commercial actions that the "insured cannot recover for loss produced by his own wrongful "act." He cites also a number of the well-known cases upon life policies in support of his position, among them Horn *vs.* Life Ins. Co., 7 Jur. (N. S.), 673; Knickerbocker L. I. Co. *vs.* Peters, 42 Md., 414; and Breasted *vs.* Farmers' L. & T. Co., 8 N. Y., 306.

Under this head (I.) we will add some general observations. No contract ought to be sustained providing for the payment of money in case of the commission of a crime, or even of an act contrary to public policy, such as is the deliberate taking of life by a sane man. Were the policy to provide that in case the insured should deliberately kill himself, when sane, the insurer would pay a certain sum to his personal representatives, it would hardly be contended that there could be a recovery.

The appellant's contention is that it would not be against public policy to permit a recovery upon a policy of insurance by an innocent assignee, and that, therefore, it cannot be against such policy to permit a recovery for the benefit of the estate of the one who committed suicide whilst of sound mind. The public policy involved is that no covenantee may, by any contract, provide for a profit to himself from a criminal or illegal act to be by him done. In the case of an assignment to, and holding for value by, a third person, the party doing the wrong is not benefited. There is nothing illegal in the taking out by a creditor directly, or by way of assignment, of a policy insuring him against the consequences of the death of a third person, however the same may be occasioned, whether by the act of such person or otherwise. The reason underlying some of the decisions where the rights of innocent third persons have been saved, especially the rights of persons holding for value, does not exist in the case of a policy held by the insured himself.

It is argued by the appellant that the insured receives nothing by reason of his death, inasmuch as the policy does not mature during his lifetime. It might as well be said that a loan returnable with interest to the lender only after his decease, cannot inure to his benefit. The distinction between a contract to be performed for the benefit of a third person and one to be performed for the benefit of the person himself, is a very obvious one.

Men acquire wealth in order that it may pass, at their decease, to relatives or beneficiaries, either through intestacy, or will. They devote their lives to such acquisition, though the benefit of the accumulation will inure only to those who will

take the estate of the accumulator. Money forming part of the estate of a dead man, subject to his will, or passing to his next of kin under the intestate laws, which can only be realized after his decease, cannot be distinguished from any other money belonging to him. All alike must ultimately pass to, and be distributed as, his estate.

The man who, being insured against fire, destroys himself and his property, at the same time, by fire, lays no foundation for a recovery of the fire insurance money, because his estate alone can reap the result.

No distinction can be drawn between a policy expressly insuring only in case of suicide, and one expressly insuring against death from all causes, including death from suicide whilst sane. So far as the contract includes the illegal provision, it must fall. Implied contracts, equally with express contracts, providing for a thing contrary to public policy, are illegal.

This thought is covered by what is said by the Lord Chancellor in Fauntleroy's Case, 2 Dow & Clark, 20:—

> Suppose that in the policy this risk had been insured in terms—that in the event of the party effecting the insurance being executed for a capital felony the money should become payable—is it possible that a claim in right of a party effecting such an insurance could be maintained, or that the insurance should not be held void as affording encouragement to crime, and being contrary to public policy? If such a policy could not be sustained where a risk of that kind was mentioned in direct terms and language, how can you give effect to a policy if it in reality involves that condition?
>
> On this short and plain ground we are of opinion that the claim cannot be sustained, and that the judgment of the court below must be reversed.

If it be argued that no man is likely to kill himself for the purpose of securing a distribution to his creditors and to his family, of insurance money, and that therefore permission to recover upon a policy for the benefit of his estate, in the case of such killing, can lead to no ill results, we reply that in the present case, a man of sound mind *did* kill himself, for the very purpose of securing to himself and to his family the amount covered by the present controversy. Runk's letters

show that his purpose, in killing himself, was to enable the insurance moneys to be recovered by his estate.

In the Fauntleroy case it was held that a policy could not be recovered under the following circumstances:—

> Fauntleroy effected the policy in January, 1815, and paid the premiums on it up to 1824. On the 29th October, 1824, a commission of bankruptcy was issued against Fauntleroy, who was duly declared bankrupt, and his estate and effects vested in the respondents, as his assignees under the commission. On the 28th October, 1824, Fauntleroy was indicted for felony, and on the 30th of that month he was tried and convicted, and received sentence of death, and was afterwards executed; and the question is whether, under these circumstances, the assignees can recover from the insurance society the amount of the sum insured on Fauntleroy's life; that is, whether—the party effecting the insurance having committed felony, and having been tried, convicted and executed for felony—the parties representing him, and claiming under him and in his right, can maintain the suit. I listened with the utmost attention to the arguments at the bar, as did the noble lord (Radnor) who is now present, and was present at the hearing of the cause, and we have come to the conclusion that the assignees are not entitled to maintain the suit.

It cannot be convincingly contended, that the contract on the part of the insurer, to pay a sum of money in case of self killing by one insured of sound mind, would only be illegal because of the mutual intent of insurer and insured, because it is only from mutual intent that a contract imposing any duty results.

3. *The deliberate killing of himself by the insured, if sane, is fraudulent* quâ *the insurer.*

In Orient Insurance Company *vs.* Adams, 123 U. S., 73, adopting the language of Chief Justice Gibson in American Insurance Company *vs.* Insly, it was said:—

> Public policy requires no more than that a man be not suffered to insure against his own knavery, which is not to be protected or encouraged by any means.

There is nothing unreasonable, unjust or inconsistent with public policy, in allowing the insured to insure himself against

all losses from any perils not occasioned by his own personal fraud.

Is it possible for the estate of the insured to recover upon a contract with an insurer, requiring the latter to pay a certain sum upon the decease of the insured, where the duty of payment results from deliberate, intelligent self-killing, done for the purpose of bringing about such payment?

The learned trial judge put as analogous, the case of a burning of his premises by one insured against fire. We have endeavored to show, under the last preceding head, the analogy which exists in the decisions, between the two classes of cases. The same lear 1 judge also put as analogous, the murder of the insured b ıe assignee of a policy. Are not the cases analogous? T ugh the appellant says they are not, has he sustained his assertion by argument?

In the case of fire insurance, the inability to recover in case of arson by the insured, results only from what is implied, viz., that no fraud upon the insurer will be committed by the insured. A condition of non-destruction by the insured is implied as much in the case of life, as in that of fire, insurance.

The assignee of a policy who murders the insured cannot recover, not by way of punishment of his crime, but because of the fraud which would result if he did recover. The refusal in neither case is because of any forfeiture of property, imposed by the law.

The appellant concedes that if the insured takes out a policy with the intent to commit suicide and subsequently, deliberately commits suicide, whilst sane, there can be no recovery on behalf of his estate. The admission is forced by decisions which cannot be challenged. If, however, it be lawful, as appellant claims, to make a contract looking to the payment to the personal representatives of the insured in case of deliberate, intelligent, suicide, why is it a fraud to make it if, at the time of making, the insured entertains the intent to kill himself? If a man has a right to stipulate for payment to his estate upon a certain condition, the insurer cannot justly complain because of the fact that the insured intends the condition shall happen. If it be a fraud upon the insurer to bring about the happening of the condition, it is

also, we submit, a fraud to enter into a contract with the intent to bring it about; but if, however, the insured does not impliedly agree that he will not deliberately, intelligently, kill himself, he can hardly be held to perpetrate a fraud by entering into a contract intending to do what is within his right under the contract, viz., thereafter to kill himself.

Having thus defined the three reasons, which, in our opinion, sustain our proposition, that there can be no recovery upon a policy by the personal representatives of one who, being insured, kills himself deliberately, whilst sane, we will add some general remarks upon the subject.

Though this contract seemed, upon its face, to be a New York contract, being executed and delivered in that State, and being made performable, both as to payment of premiums and insurance money, in that State, and though there could have been no recovery, unless it had been held to be a Pennsylvania contract, it is now sought, by the appellant, to escape from the law of Pennsylvania upon the subject.

In Hartman *vs.* Keystone Insurance Company, 21 Penna., 466, 479, it is said:—

> Besides this, the court was very plainly right in charging that if no such condition had been inserted in the policy, a man who commits suicide is guilty of such a fraud upon the insurers of his life that his representatives cannot recover for that reason alone.

It is true that in American Life Ins. Co. *vs.* Isett, 74 Penna., 176, it was said that this case "does not profess to "hold that self destruction by the insured, in all cases, avoids "the policy." Though in the Hartman case the remark was general, that the man who committed suicide was guilty of a fraud such as prevented a recovery by his personal representatives, it was meant to apply merely to the case of one who *could* commit a fraud, viz., one who committed suicide deliberately and intelligently, not to one forced to the act by overpowering mental disease.

The late Judge Trunkey, in the Bank of Oil City case, referring to a deliberate, intelligent suicide, 6 Legal Gazette, 348, said:—

> One guilty of suicide who has his life insured, commits a fraud upon the company, and there can be no recovery on the policy whether there be such a condition expressed therein or not.

Whilst there is no decided case applying *in toto*, the proposition for which we contend, there are numerous statements of the law by English judges, of the highest character, and there is no statement to the contrary in any decided case, nor in any text-book writer of any authority.

The English judges have spoken with no uncertain voice. We will refer to some of their sayings.

In Bolland *vs.* Disney, 3 Russell, 351, it is said:—

> To avoid the obligation to pay, the act of the party insured, which produced the event, must be done fraudulently for the very purpose of producing the event.

In 30 Law Journal, 511, Vice-Chancellor Wood, referring to the Fauntleroy case, heretofore fully referred to, said:—

> So the argument might be pursued—although I do not know that any case has so decided—to the same extent in the case of a person committing suicide while in a sane state of mind, thus committing the felony and losing his life thereby; but I know of no rule of law that can justify me in extending that to a case of a person committing suicide while in a state of insanity, and therefore committing no legal offense.

In Moore *vs.* Woolsey, 4 Ellis & B., 243, Lord Campbell said:—

> If a man insures his life for a year and commits suicide within a year, his executors cannot recover on the policy, as the owner of a ship who insures her for a year cannot recover upon the policy if within the year he causes her to be sunk. A stipulation that, in either case, upon such an event, the policy should give a right of action would be void. But where a man insures his own life we can discover no illegality in a stipulation that if the policy should afterwards be assigned *bona fide* for a valuable consideration, or a lien upon it should afterwards be acquired *bona fide* for valuable consideration, it might be enforced for the benefit of others, whatever may be the means by which death is occasioned. No authority has been cited in support of the position that such a condition is illegal, and the frequent introduction of it into life policies indicates the general opinion that it is unobjectionable. The supposed inducement to commit suicide under such circumstances cannot vitiate the condition more than the inducement which the lessor may be supposed to have to commit murder should render invalid a beneficial lease granted for lives. When we are called upon to nullify a contract on the ground of public policy we must take

care that we do not lay down a rule which may interfere with the innocent and useful transactions of mankind. That the condition under discussion may promote evil by leading to suicide is a very remote and improbable contingency, and it may frequently be very beneficial by rendering a life policy a safe security in the hands of an assignee.

In Jackson *vs.* Foster, 5 Jurist (N. S.), 1247, in the Exchequer Chamber, Chief Justice Cockburn said:—

The insurance office insure upon an average calculation of the duration of human life, and they protect themselves from that being abridged by violent means, especially where persons might be induced to abridge it for the purpose of enriching those who come after them. On the other hand, if policies were liable to be avoided in all cases where the death occurred by other than natural causes, one great inducement to persons to insure would be taken away. Therefore a compromise is come to; while the company protect themselves, on the other hand, they add an exception, that if the policy has been *bona fide* assigned to a third person for a valuable consideration, the condition shall not be enforced.

These decisions of the English judges are quoted approvingly not only in Pennsylvania, but also in 71 Alabama, 436, where it was said:—

The certificate is silent as to the consequence, if the member whose life was assured should die by his own hands; and the by-laws of the association, or order, when the certificate was issued, contained no provision declaring in that event an avoidance or forfeiture of the certificate. We are not aware that it has anywhere been expressly decided that voluntary self destruction by one whose life was insured, and of whose sanity there was no question, would avoid the contract of insurance; or rather, would not fall within its risk, though in that event there was not expressed an exception to the liability of the insurer. The authorities generally seem to proceed upon the tacit or expressed concession or admission that such is the law. In Moore *vs.* Woolsey, 4 Ell. & Black, 243, Lord Campbell said: "If a man insures his life for a year, and commits "suicide within the year, his executors cannot recover upon the "policy; as the owner of a ship who insures her for a year cannot "recover upon the policy if within the year he causes her to be "sunk; a stipulation that, in either case, upon such an event, the "policy should give a right of action, would be void." In Amicable Ins. Society *vs.* Bolland, 2 Dow & Clark, 1 (known as Fauntleroy's case), it was held by the House of Lords, that though there was not in the policy an exception of the liability of the insurer in the

event the assured came to his death by the hands of public justice, the exception would be implied for the reason that an express contract for liability in that event would contravene good morals and sound policy. The inference or implication of the law was, therefore, that the execution of the assured by the hands of public justice, for the commission of crime, is not within the risk of the policy. A construction, or an implication, which will preserve the legality of the contract is preferred to one which will have the opposite effect. Referring to Fauntleroy's case, it was said by Wood, V. C., in Horn *vs.* Anglo-Australian and Universal Fam. Life Ins. Co., 7 Jurist, N. S., 673: "The argument might be pressed, al- "though I do not know that any case has so decided, to the same "extent in the case of a person committing suicide while in a sane "state of mind, thus committing a felony, and losing his life "thereby." In Hartman *vs.* Keystone Ins. Co., 21 Penn. St., 466, Black, C. J., said, that though the policy was silent in reference to self destruction, if the accused committed suicide he was "guilty "of such a fraud upon the insurer of his life, that his representa- "tives cannot recover for this reason alone." Hunt, J., however, said of this case, in Life Ins. Co. *vs.* Terry, 15 Wall., 586, that it was in this respect "confessedly unsound." The case in its entirety is not supported by the current of authority. It rules that an exception in the policy, expressed in the words, "should die by his "own hand," must be severed and dissociated from other exceptions expressed in words involving the self criminality of the assured, were to be construed by themselves, and imported "any sort "of suicide," leaving it in doubt whether "suicide" expressed intentional, voluntary or involuntary, accidental self destruction.

A contract of life insurance is simpler in form, in the relative rights and duties of the insurer and the assured, and differs in many respects from marine or from fire insurance; yet, the general principles applicable to marine or fire insurance are applied, so far as consistent with the nature and obligations of the contract, to the contract of life insurance.

Then follows the extract already cited, after which it is said:—

An express contract to pay insurance money to the insured, in the event he committed suicide, an increased premium being paid because of the risk, there could be but little, if any, hesitancy in repudiating as offensive to law and good morals. The fair and just interpretation of a contract of life insurance made with the assured is, that the risk is of death proceeding from other causes than the voluntary act of the assured, producing, or intended to produce it; and especially of a contract made by an association or organization, with one of its members, the objects and purposes of which

is that the members will contribute to and bear each other's losses, or the losses of those dependent upon them. The extinction of life by disease, or by accident, not suicide, voluntary and intentional by the assured, while in his senses, is the risk intended; and it is not intended that, without the hazard of loss, the assured may safely commit crime. Bliss on Life Ins., section 242-3.

In Armstrong *vs.* Mutual Life Ins. Co., 117 U. S., 591, as we have heretofore shown, Mr. Justice Field said:—

It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired.

May we not say that it would be equally a reproach to the jurisprudence, if a contract could be made, and could be recovered upon, providing that in case of deliberate, intelligent self killing, the estate of the insured should derive any benefit therefrom?

In the last book upon Insurance, Mr. Biddle, section 830, says:—

It may be that a contract of insurance would be avoided where the insured commits intentional self destruction or suicide, and while it will be difficult to find any case deciding that it does, there are undoubtedly *dicta* to that effect.

The appellant urges that there is a *dictum* of Mr. Justice Hunt which should govern this case, to be found in Life Ins. Co. *vs.* Terry, 15 Wallace, 580. It is in these words:—

In Hartman *vs.* Keystone Insurance Company the doctrine of Borradaile *vs.* Hunter was adopted, with the confessedly unsound addition that suicide would avoid a policy, although there were no condition to that effect in the policy.

In that case this court found it necessary to decide a point concerning which there had been a great conflict of authority, the English cases, beginning with Borradaile *vs.* Hunter, having decided in a way which it found itself unable to follow. In England it had been held, under a policy providing that there could be no recovery in case of self destruction, that there was no liability in case of destruction by a man who deliberately killed himself with the intent to kill, even though

he might not be of sound mind. It became necessary to review the authorities, and, in the course of a long list of citations, the case of Hartman *vs.* Insurance Company was mentioned. The question to be decided by the judge who wrote the opinion was whether, if the policy provided against liability in case of suicide, a killing by a man of unsound mind was contemplated. It was in this connection he said of the Hartman case that it adopted the Borradaile case, which had held the insurance company under a certain clause exempt whether the insured was sound or unsound, with the confessedly "unsound addition" that the suicide would avoid the policy even though there was no condition to that effect. He was not considering the case of suicide by a man of sound mind, but one of suicide by a man of unsound mind, and in connection only with this, did he deal with the Hartman case. He thought the latter unsound, if it held that in the latter case there could be a recovery, though there was no clause saving suicide in the policy itself. The question of liability to the personal representatives of a man of sound mind, in case of suicide, was not considered by this court in that case, nor in any way contemplated by the learned judge who delivered the opinion.

In referring to Moore *vs.* Woolsey, Bliss says (section 248):—

> This shows Lord Campbell's opinion, that self destruction by a sane man avoids the policy, whether there is a clause to that effect or not. * * * And such is the admission, tacit or expressed, of nearly all the cases referred to.

In the above-cited case of Moore *vs.* Woolsey the right to stipulate in favor of an assignee, whatever the cause of death may be, is recognized in these words:—

> But where a man insures his own life, we can discover no illegality in a stipulation that, if the policy should afterwards be assigned *bona fide* for a valuable consideration, or a lien upon it should afterwards be acquired *bona fide* for valuable consideration, it might be enforced for the benefit of others, whatever may be the means of death.

The words "*bona fide*" are peculiarly significant in a case where the act of taking out the policies, and of assigning

them for a previously existing indebtedness, is continuous, and part of the same design to defraud the insurer. And of course the making of the policy payable to a third person would not come within Lord Campbell's reservation.

In Jones *vs.* Con. Inv. Ass. Co. (26 Beav., 256) the assignee was protected by an express condition in the policy. One of the conditions indorsed thereon was, that "the policy of "a person assuring his own life will become void if he dies by "his own hand or by the hand of justice," &c.; "but should "such policies have been assigned to other parties, for a valu- "able consideration, six calendar months before the death of "the assured, they remain in force, to the extent of the bene- "ficial interest therein of the parties to whom they shall have "been so assigned."

In Cook *vs.* Black (1 Hare, 393) the Vice-Chancellor (Wigram) said that the meaning of such a condition is—

> That the assured shall have the power of assigning the policy so effectually that a person advancing money upon it shall retain his security unimpaired, notwithstanding the assured might commit suicide; and by this condition the policy is rendered more valuable as a negotiable security.

In both the above cases the policy was assigned as security for advances actually made and to be made. As the Master of the Rolls said in the Jones case (page 259):—

> It was given to a person with whom the assured intended to have dealings as a security for the balance of the transactions.

In these cases the *bona fides* of the transactions were in question. Such also was the case in The Solicitors and Gen. Life Ins. Co. *vs.* Lamb, 10 Jur. (N. S.), 739; and in White *vs.* B. E. Life Ass'n, L. R., 7 Eq., 394.

In support of the contention of the appellee we cite some time-honored, familiar maxims of the law.

"*Salus populi suprema lex.*" It would be a gross violation of this rule, founded on public policy, to hold that a perfectly sane person may eradicate from the business of life insurance its underlying principle, that the time of one's death is uncertain. It would be a glaring inducement to others to defraud insurance companies; and it would encourage suicide, which public policy condemns.

"*Ex dolo malo non oritur actio.*" Broom's Legal Maxims, 7 Ed., 731-739, says that *dolus malus* includes:—

> Every kind of craft, guile or machination, intentionally employed for the purpose of deception, cheating or circumvention. * * * "The principle of public policy," says Lord Mansfield in Holman *vs.* Johnson, Cowp., 343, "is this: *ex dolo malo non oritur actio.* No "court will lend its aid to a man who founds his cause of action "upon an immoral or an illegal act."

In Pearce *vs.* Brooks, L. R., 1 Ex., 213, 218, it is said:—

> Nor can any distinction be made between an immoral and an illegal purpose; the rule which is applicable to the matter is, *ex turpi causa non oritur actio,* and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of that maxim and the effect is the same; no cause of action can arise out of either one or the other.

See also Cowan *vs.* Milburn, L. R., 2 Ex., 230.

"*Nemo ex suo delicto meliorem conditionem suam facere "potest.*" Broom (224-5) says:—

> If a husband, on his wife's death, was entitled to her fortune, he could not take the benefit of it if he murdered her.

No man shall be heard to allege his own turpitude. (Powell *vs.* Waters, 8 Cow., 669; Underhill *vs.* Van Cortlandt, 2 Johns. Ch., 339, 350.)

No man shall take advantage of his own wrong. (Hard *vs.* Seeley, 47 Barb., 428.)

He that doeth iniquity shall not have equity. (Church of Holy Innocents *vs.* Keech, 5 Bosw., 691-695.)

"*Nemo allegans turpitudenem suam audiendus.*" (Baker *vs.* Arnold, 1 Caine, 258, 269; Winton *vs.* Saidler, 3 Johns. Cas., 185.)

The law judges a man's previous intentions by his subsequent acts. (Dumont *vs.* Smith, 4 Denio, 319, 320.)

The law would rather tolerate a private loss than a public evil. (Dry Dock R. R. Co. *vs.* Mayor, &c., of New York, 55 Barb., 298-308.)

The wrongdoer shall never be heard in court to claim that his felony or other wrong gives him any advantage as a defense. (Newton *vs.* Porter, 5 Lans., 416.)

"*Nemo potest mutare consilium suum in alterius in-*
"*juriam.*"

"This," says Phillimore (Principles and Maxims of Jurisprudence, page 31), "is a rule of natural equity in eliciting "the doctrines of which there never has been a greater master "than Papinian." "By the exercise of our will we alter the "position of others, and thus confer upon them rights which "a change of purpose would destroy."

If Mr. Runk's purpose, when he effected the policies, was an honest one, he could not afterwards change it to the detriment of the defendant.

"*Nemo plus juris ad alium transferre potest quam ipse "haberet.*" "This principle is taken from the law which regu- "lates the succession to the estates of intestates; and in con- "formity thereto, if any one died before the succession of an "intestate came to him, as he had acquired no right in it, so "he transmitted none to his heirs."

The rule is extended by analogy to other means of acquisition, and another maxim is evolved from it: "That I have "no claim to a better condition than he from whom I derive "my rights." (*Id.*, 89-91.)

"*Quod quis ex culpa sua damnum sentit non intelligitur "damnum sentire.*" "*Actus Dei nemini facit injuriam.*" "The act of God signifies, in legal phraseology, any inevitable "accident occurring without the intervention of man, and may "indeed be considered to mean something in opposition to the "act of man." (Broom's Legal Maxims, page 230, and cases cited.)

It was the act of God, and not of the insured, which was contemplated as the event upon which the policy in the Runk case should become payable.

In Ehrenberg's Law of Insurance (vol. I., page 420, section 35), under the head of "Obligations of the Insurer," it is said:—

If the insured has himself intentionally called into life the circumstance by which the damage was caused or not prevented it, if it was in his power, there is as a general rule no obligation to pay on the part of the insurer, but there are matters, like the marriage of a daughter or the attaining of a ripe old age, which the insured may try to promote without jeopardizing his claim to insurance. Where the insurance is exclusively for the benefit of third parties, a claim is often recognized in favor of such third parties (for instance, in the

case of life insurance notwithstanding the suicide of the insured). But on grounds of public policy such a claim can be recognized only when it does not create a dangerous stimulus to call into existence the facts which cause the damage.

In the case of The Gresham *vs.* Rau & Memminger, Decisions of the Supreme Court of Commerce, VIII., page 304, Entscheidungen des Reichs-Oberhandels gerichts Stuttgart (1879), the insured, a merchant at the time the insurance was closed, had joined the army as a sutler and was killed. The court held that the case was not covered by the express exemption clause of the policy and that there was no general principle which exempts the company from paying, even in the absence of an express clause, for every increase of risk caused by the act of the insured. In this connection the court says (page 308):—

This is not a case where the insured caused his death by his own act or negligence, as the act of joining the army as a sutler cannot be considered as either fraudulent or negligent.

In Dernberg, Prussian Private Law, II., page 698, it is said:—

It is in harmony with the general principle of insurance law that the insurance ends when the insured risks his life voluntarily, for instance, by a duel, or where he loses it by crime or ends it by suicide, provided that it cannot be proved that such act was done when he was not responsible.

In Journal du Droit International Privé (1896), page 196, commenting on an Austrian decision holding that the burden of proof that the death was caused by a suicide is on the company, in the absence of a provision to the contrary, it is said:—

It is admitted that even without a formal clause to that effect in the policy, the insurer is not bound to pay the insurance money to the representatives of the deceased or the beneficiaries, if the death of the insured is the result of suicide, for it is a principle of law that an unlawful act of the insured discharges the insurer.

In the Spanish Code of Commerce, section 423, it is said:—

Insurance payable in case of death does not cover the decease in the following cases:—

1. If the insured dies in a duel or from the results of such duel.
2. If he commits suicide.
3. If he suffers capital punishment for a felony known to the common law.

In a charge by Judge Lowrie in Stratton *vs.* North American Mutual Co., 7 Legal Gazette, 313 (Philadelphia, October 1st, 1875), he says:—

> Surely we all know the meaning of the expression "died by his "own hand," and surely common sense says that a man who gets his life insured is not insured for his own benefit against his own intentional act of self destruction, however it might be if another should have it insured or if he should have it insured for the benefit of another. And surely the common law puts this interpretation on other contracts when it says that no man shall take any profit out of his own wrongful act, and that a policy on a house or ship is forfeited when the loss is caused by the wrongful and intentional act of the insured. And, with this expression in the policy, it is plain that, if Stratton committed suicide knowing and intending the physical effect and the result of the act by which he died, the policy is forfeited and void, and the plaintiff cannot recover.

Before concluding our discussion under this head we will further refer to the authorities cited by the appellant. All of these rest on the case of Fitch *vs.* Life Insurance Company, 59 N. Y., 573, where it was said:—

> The policy contained no stipulation that it should be void in case of the death of the insured by suicide. It was not taken out for the benefit of Fitch, but of his wife and children. Although they were bound by his representations, and any fraud he may have committed in taking out the policy, the policy having been obtained through his agency, yet they were not bound by any acts or declarations done or made by him after the issue of the policy, unless such acts were in violation of some condition of the policy. We have examined the various grounds upon which the defendant claims that this evidence was admissible, but are of opinion that they are not sufficient.

It is thus seen that the Fitch case, which is the basis of plaintiff's argument, is no authority whatever for his views.

In Patrick *vs.* Excelsior Co., 67 Barb., 202 (1875), the policy was for the sole benefit of the wife. The court said the Fitch case had "settled the doctrine that in the case of "a policy for the benefit of the wife, the suicide of the in- "sured is not a defense, where there is no stipulation to that "effect in the policy."

In Kerr *vs.* Minnesota Co., 39 Minn., 174, the policy was for the benefit of the wife. It was said:—

> In the law of insurance, suicide is not, as a rule, recognized as a ground of exemption from liability, or for forfeiture of a policy issued for the benefit of a third person, unless it is expressly so provided in the policy.

This case refers, as authority, to Mills *vs.* Rebstock, 29 Minn., 382, which simply refers to the Fitch case. Third parties were beneficiaries.

The case of Meacham *vs.* Assn., 120 N. Y., 237, is of no importance. It simply refers to the Darrow case, *infra.*

In Eastabrook *vs.* Union Mutual, 54 Maine, 228, the court said:—

> The different English life insurance companies (where unwilling to incur the risk of *suicidal insanity*) have guarded against such risk by language clearly excluding it from the policy.

If Hartman *vs.* Insurance Company be intended to mean that suicide will avoid a policy in the abstract without reference to the assured's sanity or insanity, at the time of doing of the act, then it goes beyond defendant's contention, which adds the element of sanity on the part of the suicide, and does not deal with any third person's right, but only with that of the personal representatives of the suicide's estate. The soundness of the proposition thus qualified is recognized in unmistakable terms in Life Insurance Company *vs.* Terry, 15 Wallace, 586. The learned justice, disapproving not only of the Hartman case but of Borradaile *vs.* Hunter, 5 M. & G., 639, said:—

> These decisions expressly exclude the question of mental soundness. They are in hostility to the test of liability or responsibility adopted by the English courts in other cases from Coke and Hale onwards.

Again at page 588:—

> The propositions embodied in the charge before us * * * rest upon the same basis—the moral and intellectual incapacity of the deceased. In each case the physical act of self destruction was that of George Terry. In neither was it truly his act. In the one supposition he did it when his reasoning powers were overthrown

and he had not power nor capacity to exercise them upon the act he was about to do. It was in effect as if his intellect and reason were blotted out or had never existed. In the other, if he understood and appreciated the effect of his act, an uncontrollable impulse caused by insanity compelled its commission. He had not the power to refrain from its commission, or to resist the impulse.

At page 590, the learned justice said:—

That form of insanity called impulsive insanity, by which a person is irresistibly impelled to the commission of an act, is recognized by writers on this subject. It is sometimes accompanied by delusions, and sometimes exists without them. * * * The cases are to be carefully distinguished from those where persons in the possession of their reasoning faculties are impelled by passion merely in the same direction. * * *

We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract and the insurer is liable.

It will be observed that throughout the Terry opinion, the circumstance that the clause against suicide existed in the policy, is entirely lost sight of as a controlling feature, and the whole opinion turns upon the moral sanity, or insanity, of the assured, at the time of his suicide.

What appellant says with reference to the learned judge's language in the Hartman case, being predicated of circumstances indicating a purpose to commit suicide, formed prior to the contract, would have more weight but for the fact that the language referred to the sufficiency of the suicide clause only, apart from any and all other circumstances of the case; holding that whether the clause did or did not cover suicide committed as the assured had committed it, was immaterial, for the reason that such a clause was unnecessary. "A man," said the learned justice, "who commits suicide is guilty of such

"a fraud upon the insurers of his life that his representatives "cannot recover for that reason alone."

As the opinions of men, when expressed generally and not applied to specific cases, are based upon the usual order and conditions of things, the presumption is that the learned justice had reference to a normal man, of sound mind, responsible for his acts, not to a man whose mental condition was abnormal. That this was his meaning is manifest from his characterization of suicide as "a fraud." An insane man cannot be deemed responsible for fraud.

We fail to see how the case of American Life Ins. Co. *vs.* Isett's Admr's (74 Pa. St., 167), limits, or in any sense disapproves of, the Hartman case, as appellant intimates. It holds, merely, that, notwithstanding the condition in the policy that it should be void if the insured should "die by his own hand," the plaintiff might recover if the insured was insane when he committed the act. In the absence of a provision against suicide, whether sane or insane," the decision was well founded.

In the Hartman case the question to be considered was whether on the true construction, to be determined by rules of punctuation, of a clause that in case the assured should "die "by his own hand, in, or in consequence of a duel," death from poison administered by himself would annul the policy. The court held it would, because otherwise, the clause would be meaningless, and then proceeded to point out that, apart from the clause, the policy was void for the reason that committing suicide was an act of fraud upon the company. As the learned judge very truly says, in American Life Co. *vs.* Isett's Admr's, the Hartman case "does not profess to "hold that self destruction by the insured in all cases avoids "the policy;" for it refers only to self destruction by such as could be held responsible for fraud.

Aetna Ins. Co. *vs.* Florida (32 U. S. App., 753) is cited by appellant, for a purpose not very clear, unless it be to show that the court recognized or recalled but one ground of fraud as existing prior to the Missouri statute (which was the subject of consideration) available to insurance companies as a defense, namely, "that the assured had taken out the pol-

"icy with the preconceived intent of thereafter committing "suicide and that such purpose was subsequently executed," and that it was the object and intention of the legislature to preserve this single ground, and not, as was contended, to create a new defense. But the plaintiff's counsel, after quoting at length from the opinion to prove his theory, stopped short of the very language that disproves it, as follows: "It "must be borne in mind that the general purpose of the stat- "ute was to curtail the rights of insurance companies rather "than enlarge them." From this it is clear that the court, as well as the legislature, recognized as possible that suicide might afford and did afford, prior to the statute, effective defenses, even though it was not contemplated when the policy was taken out. It was to prevent such defenses that the statute was passed.

Darrow *vs.* Family Fund Society (116 N. Y., 537) has no great bearing upon the present case. This cannot be shown more clearly than by quoting from the opinion at page 542:—

> The provision relied upon to support the defense so alleged, is the provision in the contract that it should be void if the member herein shall die in consequence of a duel, or by the hands of justice, or in violation of or attempt to violate any criminal law of the United States or of any State or country in which the member herein named may be. The death of Darrow was in this State. At common law suicide was a crime. * * * It is not a crime in this State. The attempt to commit suicide is made a crime by the statute. * * * By the act of taking his own life he (the assured) violated no criminal law. * * *

It is true that in the case cited "it was alleged as a defense, "and the defendant offered to prove on the trial, that the "member, Darrow, died from the effects of poison taken by "him and which was administered by himself with intent to "take his own life." It is also true that the exclusion of this testimony was sustained by the New York Court of Appeals upon the ground that "suicide was no defense unless it came "within some condition of the contract of insurance relieving "the defendant from liability in such case," citing Fitch *vs.* A. P. L. Ins. Co. (59 N. Y., 557). In the case cited, as in that which the court was considering, the policy contained

no stipulation that it should be void in case of the death of the insured by suicide. In both cases the policy was taken out for the benefit, not of insured's estate, but expressly for the benefit of a third person, namely, his wife in one case, and wife and children in the other. Herein lies the distinction between the present case and the case relied upon by counsel.

Of course if the policy had been taken out in favor of his estate, his estate would have been bound by his acts and declarations, whether before or after the policy was effected.

What has been said with reference to the case of Darrow *vs.* Family Fund Society applies so far as the cases are alike to Meachem *vs.* The Association (120 N. Y., 237), and nothing need be added.

Kerr *vs.* Minnesota Mutual Benefit (39 Minn., page 175) upholds the decision in the Darrow case in the language already quoted.

In Mills *vs.* Rebstock (29 Minn. App., 383) it is said:—

"In the case of a policy of life insurance issued for the ben-"efit of the heirs of the person insured, it is well settled that the "fact of his death by suicide, unless otherwise expressly stip-"ulated, is no defense," and the case of Fitch *vs.* The American P. L. Ins. Co. (59 N. Y., 557), considered above, is cited as an authority. It is to be observed that the words "issued "for the benefit of the heirs" are used in the quotation. The word "heirs," as will be seen by reference to the head note in the case, is not intended to indicate, as, of course, it does not mean, the person to whom the policy would naturally descend; in other words, it does not intend "personal representa-"tives" as next of kin.

To quote the head note:—

"Suicide is no defense to an action or a policy issued for the "benefit of a third person." Moreover, Fitch *vs.* American P. L. Ins. Co., cited as an authority, would support no other construction.

Northwest Assn. *vs.* Warner (24 Ill. App. Ct. Rep., 357) holds, as appellant says, and nothing more, viz., that an insurance company cannot, by a by-law, forfeit any of the rights of the assured under a policy already issued before its contract.

The quotation from Cook on Life Insurance (page 41) does not refer to a case like the present, in which the policy was for the benefit of the insured's estate, and the insured was sane when he committed suicide. It states general principles to which all assent.

In his charge to the jury Judge Butler expressed the view (Record, page 140) that—

> Every contract of life insurance contains an implied contract that the insured would not intentionally terminate his life, but that the insurer shall have the benefit of the chances of its continuance until terminated in the natural, ordinary course of events. It is on these chances that the premium is calculated and based and the contract is founded.

Counsel emphasizes the last sentence and suggests that the court erred in expressing the opinion, as it was based on no evidence presented at the trial, as to how mortality tables are prepared. Manifestly the remark had no reference to mortality tables, but was thrown out as something that the jury as ordinarily intelligent men would take notice of—something self-evident, viz., that men will seek to protect rather than to destroy their own lives, and that the defendant took its chances upon that probability.

Of course suicide, as a possible and probable cause of death, is to be considered in preparing mortality tables. To sustain this it is unnecessary to cite authorities. But that the great bulk of humanity cherishes life as sacred, as a thing to be protected against every possibility of danger, is a circumstance by itself which controls not life insurance alone, but every other enterprise. It controlled and doubtless gave the greatest impulse to the growth and advancement of the business before mortality tables were heard of. It seems, therefore, unnecessary to consider further the cases cited by counsel with the object indicated. We concede that the general tables of mortality include suicide.

The appellant contends that "the true question always is, "was the act committed with a felonious intent?" Suppose a case, he says, in which the creditor is the sheriff and the debtor sentenced to be hanged; or one in which the creditor takes his debtor's life in battle against a foreign foe. The

answer is, that in both supposed cases the creditor acts as the instrument of the State; in the one case, to execute the law, in the other, to protect the government.

The appellant says:—

> In the absence of a statute declaring what is public policy, or of a condition in a contract limiting its operation, it is not the function of the court to declare contracts void because of supposed public policy.

Whether this be a true proposition, or whether it be sustained by the very lengthy quotation from the cases relied upon, is extremely doubtful. Carpenter's Estate (170 Penn. St., 203) is, in no aspect, applicable either in support of the plaintiff's cause or of the proposition; nor is Fitch *vs.* Insurance Co. (59 N. Y., 557).

In Moore *vs.* Woolsey (4 Ellis & B., 243) it was held simply that it is not illegal to stipulate that "if the policy should after-"wards be assigned *bona fide* for a valuable consideration, or "a lien upon it should afterwards be acquired *bona fide* for "valuable consideration, it might be enforced for the benefit "of others, whatever may be the means by which death is oc-"casioned."

Jones *vs.* Consolidated Investment Ass. Co. (26 Beav., 256) decides the same thing in principle, holding that under a policy, which contained a similar condition and exception, a letter charging it with a particular debt contracted three years prior to the death of the assured by his own hand, was enforceable.

White *vs.* British Empire Life Ass. Co. (L. R., 7 Eq., 394) decides that a policy containing a condition against suicide and an exception, as in the last two cases, in favor of third persons acquiring an interest, is valid, as to such interest, as a security, even though the holder of the security is the insuring company, and though the insured's debt, consisting of an advance by the company, is thereby discharged. Of course, the effect of such a decision is to benefit the insured's estate; but he was entitled to the benefit of every provision of the policy up to the moment of defrauding the company by committing suicide or until the policy became void by his

so doing; and among the benefits to which he was entitled was the present right to deposit the policy as security for an advance. Having acted upon that right, by obtaining the loan and making the deposit, he, as well as the lender, became mutually affected as parties to an executed contract, to be considered separately and apart from the policy as a whole. Up to the moment of affecting the security by depositing the policy no fraud had been committed. It was the subsequent suicide that constituted the fraud and rendered the policy void. As was said by Sir R. Malins, V. C., in the case cited, adopting the language of another case:—

> The object of the condition is to increase the value of the policy to the holder, *i. e.*, in the first place, to the assured. And if that be so, I do not see how I can hold that in the absence of fraud the estate of the assured is to be deprived of the benefit intended to be given to him by the exception, merely because the mortgagee happens to be fully secured. * * * This condition, then, being for the benefit of the assured, and it being admitted that if he had deposited it for value with an indifferent person, it would have been valid to the amount of such interest, why should the assured be in a less favorable position because the assurance company have themselves advanced him money and taken it as a security?

The appellant says:—

> These cases show that there is no public policy recognized by the courts of England or America which prevents relatives and creditors of a suicide, and even the estate of a suicide, from receiving the proceeds or benefit of a life policy which becomes, by its terms, payable on the death of a man who in fact dies by his own hand.

What they really show is, that rights and interests which have become vested through the operation of the separable provisions of the policy cannot be impaired or affected by the subsequent suicide of the assured; but that when the interests of third parties are not involved, as when the assured retains control of the disposition of the policy or its proceeds until his decease, which he brings about by his own hand, consciously, and with a deliberate and intelligent design of securing to his estate the benefits of the policy in a way which, if not expressly, was certainly impliedly, excluded from the contract, he is guilty of a fraud which operates as a complete defense.

Kelly *vs.* Mutual Life Ins. Co. (75 Fed. Rep., 637) is cited to show that

> **The general practice of the defendant company also shows that it does not regard suicide by itself as a reason for avoiding the policy on the grounds of public policy.**

Jackson *vs.* Foster (5 Jurist (N. S.), 547) simply holds that an assignee is bankruptcy is not within the provision of a policy which protects the vested rights of third parties acquired by assignment or otherwise. An assignee in bankruptcy is not a purchaser for value. He takes nothing more than the interests of the assignor, under the assignment. He is the representative of the insured's estate.

Knights Templar and Mason's Life Indemnity Co. *vs.* Berry (50 Fed., 511) and Aetna Ins. Co. *vs.* Florida (32 U. S. App., 753) the Missouri statute is considered, which provides that "even if the clause be written in," quoting from counsel's brief, "the fact of suicide is no defense unless the party con-"templated suicide in applying for the policy." They merely show that the Missouri statute has been the subject of judicial consideration.

The Missouri statute and the Pennsylvania Constitution are referred to as showing generally that suicide is not in its character felonious in the opinion of the lawmakers. That may have been the opinion of the majority of the legislature in Missouri when the Act was passed, and possibly of the electors of Pennsylvania at the adoption of the Constitution, *but it has nothing to do with this case.*

Terry *vs.* Ins. Co., 15 Wall., 580, already considered, is again referred to as authority for the proposition that whether the insurance was effected by the insured or some one else, as, for instance, by the insured's wife, is immaterial. In the case before the court it certainly was immaterial, the sole question there being as to the sanity or insanity of the insured.

Appellant quotes at length from Biddle on Insurance (Brief, pages 28, 29), matter which, in this case, is without value, saving the following:—

> It may be that a contract of insurance would be avoided when the insured commits intentional self destruction or suicide, and

while it will be difficult to find any case deciding that it does, there are undoubtedly *dicta* to that effect. Citing Moore *vs.* Woolsey, 4 E. & B., 243; Horn *vs.* Anglo-Aus. Ins. Co., 30 L. J. Ch., 511; Sup. Com. *vs.* Ainsworth, 71 Ala., 436; Jarvis *vs.* Ins. Co., 5 Ins. L. J., 507. "It has indeed been held that the suicide of the insured will not "avoid a policy in the absence of a clause against suicide taken "out for the benefit of some one else, as a wife, child, &c. When, "however, a policy is taken with the fraudulent intent to take "one's life, a suicide will obviously." Citing Fitch *vs.* Ins. Co., 59 N. Y., 577; Patrick *vs.* Ins. Co., 67 Barb., 202; Mills *vs.* Rebstick, 29 Minn., 380; Kerr *vs.* Mut. Ben. Ass'n, 39 Minn., 174; Smith *vs.* Ben. Soc'y, 51 Hun., 575.

Other authors, Bliss, Bunyon and Bacon, are quoted at length, though they are really hostile to the appellant's position.

Estabrooke vs. *Union L. I. Co.* (54 Maine, 224); *Borradaile* vs. *Hunter* (5 M. & G., 633); *Dean* vs. *American L. I. Co.* (4 Allen, 96); and *Nimick* vs. *Mutual Ben. Assn.* (1 Bigelow, 689), are quoted to show that while the constructions placed by the courts upon the clause making policies void in case of suicide are "very diverse, there is a remarkable "unanimity in these opinions in stating the reason of the rule "in a manner which strongly supports the contention of the "plaintiff in error." If the appellant means that the process of reasoning on the part of various courts and judges produces diverse results, we can only say that no construction or *dicta* used in arriving at particular conclusions, are unfavorable to the appellee's position.

II. Insanity was correctly defined by the learned trial judge.

The appellant boldly asserts that the charge of the learned trial judge, in which he defined mental unsoundness, was not in accordance with the decisions of this court. Though he quotes from the charge and from the decisions at length, he contents himself with the mere assertion that there is a difference. He does not demonstrate its existence. After a very careful comparison of what has been said by this court in the decisions from which he cites, with what was said by the learned trial judge, we fail to see the difference claimed to exist.

The learned trial judge said (Record, page 139):—

If one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequence and effect, such self destruction will not of itself prevent recovery upon the policies. * * * We must understand what is meant and intended by the term "moral character of his act." It is a term which has been used by the courts and is correctly inserted in the point; but it is a term which might be misunderstood. We are not to enter the domain of metaphysics in determining what constitutes insanity, so far as the subject is involved in this case. If Mr. Runk understood what he was doing, and the consequences of his act or acts to himself as well as to others; in others words, if he understood, as a man of sound mind would, the consequences to follow from his contemplated suicide, to himself, his character, his family and others, and was able to comprehend the wrongfulness of what he was about to do, as a sane man would, then he is to be regarded by you as sane. Otherwise he is not.

He added:—

I therefore charge you that if he was in a sane condition of mind at the time, as I have described, able to understand the moral character and consequences of his act, his suicide is a defense to this suit.

He had been requested by the appellant to charge:—

If one, whose life is insured, intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequence and effect, such self destruction will not of itself prevent recovery upon the policy.

He affirmed this point; but deemed it necessary that the jury should be instructed concerning the meaning of the expression "the moral character of his act." Counsel for the appellant and the court were in accord concerning what constituted irresponsible insanity. The error, therefore, which the appellant attributes to the learned trial judge is, that he failed properly to define the "moral character of his act."

The brief of the appellant is silent in expressing in what respect the charge is thought to be erroneous, whether too broad or too limited. Though long extracts from decisions,

sometimes more, but usually less, applicable are made, there is no attempt to show wherein what is said in the course of such decisions differs from what was said in this case. This court is left to discover in what, if there be a difference, it consists.

The appellant says that in the opinion of Mr. Justice Hunt, in Life Insurance Company *vs.* Terry, 15 Wallace, 580, is to be found "the true statement of the rule upon this subject." The definition of responsible insanity given by Mr. Justice Hunt is as follows (page 590):—

> If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches and there can be no recovery.

The requirement, as stated by Mr. Justice Hunt, was that the assured should be "in possession of his ordinary reason-"ing faculties." The requirement as stated by Judge Butler was, that the assured must understand, "as a man of sound "mind would, the consequences to follow to himself, his char-"acter, his family and others, and was able to comprehend the "wrongfulness of what he was about to do as a sane man "would."

In indicating particular motives or impulses, such as "anger, "pride, jealousy or a desire to escape from the ills of life," Mr. Justice Hunt of course did not intimate that these were the only motives reconcilable with sanity. He gave such illustrations as occurred to him, without meaning to exclude others.

He affirmed the following charge of Mr. Justice Miller (page 582):—

> If you (the jury) believe from the evidence that the decedent, although excited or angry, or distressed in mind, formed the determination to take his own life because in the exercise of his usual reasoning faculties he preferred death to life, then the company is not liable, because he died from his own hand within the meaning of the policy.

Other courts had held a man to be mentally sound, within the meaning of a life insurance policy, if he had deliberately

killed himself, or had done what he knew would result in his death, with the intent to end his life. This court, however, held that a man was not sane though he did not know what he was doing and meant to do it, if he was mentally unable to discriminate between right and wrong in his perception of the consequences of his act. We concede that a man is not of sound mind "who is not able to understand the moral char- "acter and consequences of his act." The learned trial judge so charged.

Let us consider the cases so confidently appealed to by the appellant. Mr. Justice Miller, in the Terry case (15 Wallace, 582), had charged:—

> The act of self destruction must have been the consequence of insanity, and the mind of the decedent must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing. If he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable.

In affirming this charge, Mr. Justice Hunt said (page 583):—

> The request for instructions made by the counsel of the insurance company proceeds upon the theory that if the deceased had sufficient mental capacity to understand the nature and consequences of his act, that is, that he was about to take poison, and that his death would be the result, he was responsible for his conduct, and the defendant is not liable; and the fact that his sense of moral responsibility was impaired by insanity does not affect the case. The charge proceeds upon the theory that a higher degree of mental and moral power must exist; and although the deceased had the capacity to know that he was about to take poison, and that his death would be the result, yet, if his reasoning powers were so far gone that he could not exercise them on the act he was about to commit, its nature and effect, or if he was impelled by an insane impulse which his impaired capacity did not enable him to resist, he was not responsible for his conduct, and the defendant is liable. * * * The propositions embodied in the charge before us are in some respects different from each other, but in principle they are identical. They rest upon the same basis—the moral and

intellectual incapacity of the deceased. In each case the physical act of self destruction was that of George Terry. In neither was it truly his act. In the one supposition he did it when his reasoning powers were overthrown and he had not power or capacity to exercise them upon the act he was about to do. It was in effect as if his intellect and reason were blotted out or had never existed. In the other, if he understood and appreciated the effect of his act, an uncontrollable impulse caused by insanity compelled its commission. He had not the power to refrain from its commission, or to resist the impulse. Each of the principles put forth by the judge rests upon the same basis—that the act was not the voluntary, intelligent act of the deceased.

He further said:—

When we speak of the "mental" condition of a person we refer to his senses, his perceptions, his consciousness, his ideas. If his mental condition is perfect, his will, his memory, his understanding are perfect, and connecting with a healthy bodily organization. If these do not concur his mental condition is diseased or defective.

He concluded:—

If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable.

In the Rodel case, 95 U. S., 232, Mr. Justice Bradley said:—

The judge properly refused the request to charge that the plaintiff could not recover if the insured knew that the act which he committed would result in death, and deliberately did it for that purpose. Such knowledge and deliberation are entirely consistent with his being, in the language of the charge, "impelled by an in-"sane impulse which the reason that was left him did not enable "him to resist," and are, therefore, not conclusive as to his responsibility or power to control his actions.

In the Broughton case, 109 U. S., 121, Mr. Justice Gray said:—

The remaining and the most important question in the case is whether a self killing by an insane person, having sufficient mental

capacity to understand the deadly nature and consequences of his act, but not its moral aspect and character, is a death by suicide within the meaning of the policy. * * * If he was impelled to the act by insanity which impaired his sense of moral responsibility, the company was liable.

In the Akens case, 150 U. S., 468, counsel presented the oft-discredited point, running thus:—

If the jury believe from the evidence that the self destruction of the said Smith was intended by him, he having sufficient capacity, at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it, then and in that case it is wholly immaterial in the present case that he was impelled thereto by insanity which impaired his sense of moral responsibility and rendered him to a certain extent irresponsible for his action.

The learned trial judge there held:—

If he was impelled to the act by an insane impulse, which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to commit, the defendant is liable.

Mr. Justice Gray again repeated:—

If one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequence and effect, it is not a "suicide."

All the cases from which we have just quoted, require that to constitute mental unsoundness the *reasoning* faculties must be so impaired by insanity that the suicide does not understand the moral character of his act; that the suicide must be urged by an insane *impulse;* that he must be impelled to the act by *insanity*, impairing his moral sensibilities; and that his *reasoning faculties* must be so impaired that he is not able to understand the moral character, &c., of his act. If the charge of the learned trial judge, as extracted, be examined, it will be found that he insisted upon all these requirements.

The appellant says the cases require that there shall be an "impairment not only of the moral vision, but also of the "*will*, so as to leave the deceased in a condition that he was "unable to resist the impulse of self destruction."

It can hardly be said that a man so impelled by the impulse of self destruction as to be "unable to resist" it, is not a man whose "reasoning faculties are so far impaired by insanity that "he is unable to understand the moral character of his act, "even if he does understand its physical nature, consequence "and effect."

The definition of insanity to be found in Davis *vs.* United States, 165 U. S., 373, is stated by the appellant to contain an element which is lacking in the charge of the trial judge. This element is supposed to be found in these words:—

> The term "insanity," as used in this defense, means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control.

Can it be said of a man, in whom the governing power of his mind has been, otherwise than voluntarily, "so completely "destroyed that his actions are not subject to it, but are be-"yond his control," that he is able to understand the moral character of his act and the consequences of the same to himself as well as to others, as a man of sound mind would?

As we have said, however, there was no request of the learned trial judge to charge concerning an insane impulse. He affirmed, in the language of the request, what he had been asked to charge as to what constituted insanity, and merely defined, by way of necessary addition, what was meant by "moral character of the act."

It is difficult to see how the reasoning of the appellant, to the effect that Runk was impelled to death by an insane and irresistible impulse which his weakened mental and moral powers could not withstand, is sustained by the letters quoted

on page 46 of his brief. These show the intention of Runk to sacrifice his own life in order that the debts might be paid for which he was criminally responsible. They establish nothing concerning being impelled by an irresistible, insane, impulse. What they do prove is, a thorough appreciation by Runk of the act he was about to commit, and the intent, not an insane one, which impelled him.

The "morbidly sensitive mind" of Runk was not displayed by the evidence. He had gambled in stocks with moneys which he had abstracted from the funds of charitable and religious institutions. His partner had discovered his embezzlement of firm moneys. He was confronted with social obloquy and criminal penalties. He was unwilling to face what was inevitable, and was determined to kill himself. Whilst doing this he desired to pay his debts, largely owing to near relatives, with the proceeds which would be realized from his insurance. Every element of an insane impulse is lacking in what Runk did. There was no claim in the evidence that he was so actuated. The points presented to the trial judge illustrate an idea of the appellant, not consistent with his present suggestion of "insane impulse."

It is true the learned trial judge did say to the jury that he did not "regard the evidence on which the plaintiff relies "as strong." It would perhaps be well for the appellant, if he thinks the evidence really was strong, to refer to passages which support his opinion. It is difficult for the appellee to prove the negative. The affirmative, if provable, could easily have been established by the appellant, by citations. We can only say that an examination of the evidence will fail to disclose insanity, or anything approximating it.

We fail to appreciate the thought embodied in the following extract from the appellant's brief:—

> When evidence has been adduced tending to show insanity, so that the question of sanity or insanity is an issue to be determined by the jury upon the evidence before them, then the burden of proof is upon the party who has charged the commission of a crime, not only to show the physical fact of the killing, but that the killing was done by one of sound mind. The failure to find this principle permeated the entire charge of the court below.

Insanity is not presumed. The burden of proof lies upon him who asserts it. If he adduces insufficient, or weak, evidence, he is aided by no presumption which supplements what fails to establish that fact of insanity, which it is his duty to establish.

III. There was abundant evidence tending to prove that Runk conceived a design of effecting policies for the benefit of his estate with the intent, thereafter, to take his own life.

In Regina *vs.* Grant, 4 Foster & Finlayson, 322, the defendant offered to prove that the prisoner's circumstances were easy. This was objected to, but Pollock held that it was admissible, "for when it was evident that possibly the prisoner's "motive might have been to realize the money insured upon "her goods, surely it was material to show that her circum-"stances were such as not to raise any temptation to the act." The evidence was admitted accordingly, and Denman, in reply, conceded that it was admissible and material.

The affidavit of defense set up the defense of fraudulent intent in securing the policies as well as the defense ultimately submitted, alone, to the jury. It reads, *inter alia*, thus:—

> On or about the fifth day of October, 1892, he deliberately committed suicide, intending to kill himself, at a time when he was of sound mind, and in the full possession of his mental faculties. This suicide was not the result of mental unsoundness and was not occasioned by mental unsoundness. It was the deliberate act of a man mentally and morally able to understand all the consequences of his act.

Both defenses, as well as that growing out of the execution of the application, were opened by counsel. It is somewhat anomalous that the speech of counsel is returned as part of the record, though it forms no part thereof, whilst a very important piece of testimony, *i. e.*, the deposition of Mrs. Barcroft, is not. The appellee has been compelled to print this as an appendix to its argument.

During the whole trial both defenses were sought to be established by evidence.

After all the testimony had been presented, and after points had been submitted by the defendant, including one which very clearly raised the defense of fraud in the inception of the insurance, in these words:—

If you find that Runk obtained the policies of insurance sued upon at a time when he was insolvent and an embezzler, with the intent thereby to secure, in case of his death, from the plaintiff, the fund with which to pay those to whom he was indebted, and whose property he had embezzled; that he subsequently committed suicide, whilst of sound mind, with the deliberate intent to carry out this scheme, there can be no recovery.

After consideration of these points, the learned trial judge suggested that under the view which he took of the law, it would seem unnecessary to submit more than one question of fact; that being of the opinion that the policies could not be recovered upon, if the jury should find that Runk, when of sound mind, deliberately killed himself, it was not necessary to embarrass them by the other question in the cause, viz., the intent at the inception. As he suggested, if the intent was fraudulent at the inception, but if the self killing by Runk was whilst insane, the defense would not be good; but if the self killing was whilst sane, the original intent was unimportant.

Under this suggestion, and not because of any idea that the evidence did not justify the submission of the fact, counsel for the defense withdrew the third point and conceded that the judge might put to the jury simply the question upon which he charged. There was no intention to abandon for lack of evidence.

As no exception was taken to the evidence of Hopper, no error can be assigned to its reception. It is not necessary, however, to press this point, in view of what is equally fatal and more substantial.

The testimony of Cullinan, as well as of Hopper, showing the desperate financial situation of Runk at the time he entered into the additional contracts of insurance, was not the first evidence upon that point which was offered. A very large amount of proof had been previously given, without any objection, concerning the financial situation of Runk.

Under our view of the entire competency of the evidence, it is hardly necessary to add that no motion to strike it out was ever made.

Can it be successfully argued, in view of the admission by the plaintiff that he could not succeed if Runk entered into the contract with the intent subsequently to kill himself, that evidence was not competent which showed that at the time the policies were issued, Runk was an embezzler, was insolvent, and was without means to maintain them?

Practically, the appellant puts the error which he thinks was made, upon the refusal of the learned trial judge to charge that the evidence was "not sufficient to warrant the jury in "finding that the deceased entered into the said contracts of "insurance with the intention of committing suicide."

It is almost impossible to prove a fraudulent intent by direct evidence of declarations as to its existence by the man accused of entertaining it. Those who intend to perpetrate a fraud do not publish the fact. Their intent can only be gathered from circumstances.

Was not a jury at liberty to infer a fraudulent design from the following facts?

Runk, absolutely insolvent, having embezzled nearly $85,000, obliged to pay annual premiums of about $12,000 on policies of insurance to the amount of $315,000, though he possessed no income other than the $700 per month he could only continue to draw so long as his defalcation should remain unknown, procured, about the 10th of November, 1891, policies to the extent of $195,000 additional, entailing the payment of an annual additional premium of about $8000, though obliged to make the first payment, by improperly drawn store orders upon his firm, which remained partly unsettled at the time of his death.

Is it conceivable that he put upon himself this additional burden of $8000 per annum, though without funds to keep up the insurance already existing, with no intention to bring the duty of payment to a speedy end? Within a year, with part of the premiums still unpaid, after writing letters in which he said he would kill himself in order that he might settle his indebtedness and embezzlements, with the insurance moneys,

he committed suicide. Would not the learned trial judge have done a gross injustice to the defendant, if he had charged that there was no evidence from which the jury might find an intent, at the time of taking out the policies, to defraud? It must be conceded that before the death there was a deliberate intent to render the insurance available by suicide. It was for the jury to say when this intent was first formed. Could they fairly have found, under the financial and other circumstances surrounding Runk at the time he secured the additional contracts, that he expected, for any considerable time, to pay the premiums? He must have known that he would be unable to raise the $12,000 with which to meet the premiums on existing policies. Is it likely that he would have entailed upon himself a great additional burden, if he expected long to carry it?

It is probable that when these additional policies were taken out Runk determined to embark upon a speculation which, if it succeeded, would enable him to liquidate his embezzlements and indebtedness, but which, if it failed, would entail upon those whom he wanted to protect, no loss greater than what would be covered by the insurance.

During the period following the additional contracts, he overdrew his account with the firm. With these overdrafts it is more than probable he met the speculative margins he was compelled to give. He took care, however, to keep the amount of his overdrafts within a limit which, with the addition of embezzlements and previous indebtedness, would not be in excess of the amount of his insurance.

The appellant says that it was evident, by the testimony of one Pierce, that he had urged the taking of the additional insurance upon Runk, and that he succeeded in placing it by an appeal to the vanity of the latter. In what way the idea of an additional insurance first originated, we know not, but we do not credit the suggestion that, under the shadow of the penitentiary, Runk's vanity was an active factor. It may be that a suggestion by Pierce started the scheme; but Runk knew, what Pierce did not, that he was unable to pay the premiums, and that the additional insurance would be impossible to be maintained saving during a very short term of life. The

testimony of Pierce is utterly unreliable, as will appear by an examination of what he said with reference to an inability to induce Runk for some time to take the amount subsequently issued, although it appeared, by the signed application, that Runk, at that very time, had designated the method in which the total amount should be subdivided, and the amount of insurance to be issued in the name of his wife.

Nothing but what Runk had long known was inevitable, occurred between him and Darlington. For years he must have known that he stood upon the brink of disclosure. He doubtless contemplated, for at least a year, the possibility of that happening which he meant to meet by mulcting the insurance companies.

The appellant lost nothing by the course taken under the suggestion of the learned trial judge. The issue of fraud at the inception of the policy was quite as likely to be decided against him by the jury as was that of Runk's soundness of mind at the time of his suicide. Had the testimony been erroneously admitted, the course taken in the charge, which put to the jury only the question of soundness of mind, eradicated all the evil. We rest, however, upon our assertion that the testimony was properly admitted, in proof of an issue which, if established, was a vital one, and that it was not within the power of the learned trial judge to say that there was no testimony sufficient to warrant a finding of fraud in taking out the additional insurance.

In Smith *vs.* N. B. Society, 123 N. Y., 88, it was said:—

> The declarations must be made at the time of the act done which they are supposed to characterize. They must be calculated to unfold the nature and quality of the facts which they are intended to explain, and they must so harmonize with those facts as to form one transaction. That transaction, the thing done, the fact put in issue, was the fraud which evidently was not a simple, but a compound and continuous fact, proceeding to its result by consecutive steps and separate acts having necessarily an origin, a progress and an ultimate result, involving not only the intent of the assured, but also his sanity, without which the responsible intent could not exist. This fraud, therefore, could be studied and proved all along the line, and in all its stages, from origin to culmination, formed part of the issue to be investigated. If in such a case declarations are excluded which are merely narrative of a past trans-

action the residue, so far as pertinent to the issue, will generally and with few exceptions be admissible in evidence.

It is thus not difficult to decide that the proof of applications by Tyler to thirty-six different insurance companies, by which he secured $282,000 of insurance upon his life, and his letters and telegrams to relatives and friends written and sent as steps or agencies in the consummation of his purpose, and indicating a sane and deliberate intent to consummate the fraud, which for more than a year had been in preparation, by a final act of suicide, were all admissible. But some of the evidence was more remote and approached so near to the outside boundaries of the *res gestae* as to require a specific and particular examination. * * *

The declaration accompanied and characterized an act which was itself admissible in evidence, for that act indicated the then desperate character of Tyler's financial situation, and the declaration explained the operation and effect of the fact upon his mind, its force and strength as a motive to the fraud, and the presence of a thought or contemplation of suicide in a contingency which did in fact occur. The evidence serves to indicate the origin and motive of the alleged suicidal intent which grew to be the effective agency of the fraud. * * * They were contemporaneous with the fraud in its formative stages; they accompanied Tyler's efforts to raise money, which failed, and to procure an insurance upon his life which he knew he could not continuously maintain. They show the motive of the fraud and mark its progress, and harmonize so completely with all which afterward occurred as to constitute, with that, elements of the single transaction, the fraudulent conduct which raised the issue presented by the defense. And so I think the proof came fairly within the rule relating to the *res gestae*, and did not transcend its limits.

Some of this evidence was resisted upon the ground that death by suicide was no defense under the terms of the policy. That is true; but the defense was fraud, and suicide the ultimate agency by which the fraud was accomplished. It was necessary, therefore, to prove it, and in such manner as to indicate that it was not an insane or sudden impulse, but the culmination and effective working out of a deliberately conceived purpose of fraud.

Runk's consent to the issue of the policies was not "wrung "from him only by the most persistent importunity of an "agent." An agent suggested the advisability of additional insurance, and Runk, who was totally insolvent and was unable to maintain the payment of his premiums, and therefore knew what the agent did not, saw in the suggestion an opportunity of which he availed himself. It is not true that the

irregularities were almost entirely committed after the issuance of the policies in suit. The defalcations anterior to the issuance of said policies were very large, and involved charitable and religious associations.

What occurred within a week of Runk's death was the culmination, in consequence of an exposure, of what had existed for years.

The limitation of the issue by the court, in the submission of the case by counsel to the jury, was not because of the failure of the testimony, but because under the court's view of the law such enlarged submission was unnecessary.

The evidence discloses what was stated by the appellee's counsel in his opening, viz., that at the time the policies were taken out Runk was insolvent to the extent of upwards of $350,000; that he had theretofore embezzled the funds of the charity of which he was the treasurer and of the firm of which he was a member; that he was unwilling to face the dishonor and disgrace which was imminent; and that he was unable, by any possibility, to continue to carry the new policies which he caused to be issued.

CHAS. P. SHERMAN,
EDWD. LYMAN SHORT,
JOHN G. JOHNSON.

APPENDIX.

A. Howard Ritter, Executor of the estate of William M. Runk, deceased,

vs.

The Mutual Life Insurance Company of New York.

A. Howard Ritter, Executor of the estate of William M. Runk, deceased,

vs.

The Home Life Insurance Company.

Deposition* taken without rule, by agreement, upon mutual understanding as to time, of Mrs. Mary A. Barcroft. Deposition taken because of a physician's certificate that Mrs. Barcroft would not be able to be in attendance at court.

Present—Mr. George Tucker Bispham, for plaintiff; John G. Johnson, Esq., for Mutual Life Insurance Company; and John Scott, Jr., and John G. Johnson, Esqs., for Home Life Insurance Company.

Mrs. Mary A. Barcroft, being duly sworn, deposed as follows:—

By Mr. Johnson:

Q. At the time of William M. Runk's death, was he indebted to you, and if so, in what amount?

A. Yes, sir; I held his note for $127,550.

Q. Do you remember the date of that note?

A. November 10th, 1890.

Q. That was his total indebtedness to you, was it, at the time of his death?

A. Yes, sir.

*This deposition was read at the trial (see Record, page 56), but has been in some way omitted from the Record filed.

Q. Had he had any charge or custody of your financial matters in any way?

A. No, sir.

Q. What collateral did you have for that note?

A. Life insurance policies.

Q. Can you tell in what companies?

A. Policy No. 36,437 in Penn Mutual Life Ins. for $5,000
" " 36,438 " " " " .... " 5,000
" " 42,802 " " " " .... " 20,000
" " 110,445 " North Western Mut. .. " 10,000
" " 12,796 " State Mutual Life Assur. " 10,000
" " 172,721 " Northwestern Mut. Ins. " 35,000
" " 228,556 " New York Life Ins. Co. " 25,000
" " 228,557 " " " " " " " " 25,000

Q. And these policies you retained, without any change, until his death?

A. Yes, sir.

Q. And upon his death, you collected some of them?

A. Yes, sir; all of them.

Q. Do you remember the total collected?

A. There was some interest due, and there were some bonds that had to be redeemed, and I just made use of all of them to pay these off, and, I think—I am quite sure, that it took the whole amount.

Q. How much did you realize from the policies?

A. $135,000; it may have been a little over.

Q. Then there was enough realized from the policies to pay the note?

A. Yes, sir.

Q. That note was one that he gave for a loan that was regularly made and continued from time to time?

A. Yes, sir.

Q. Did you renew the note, or was it the same note?

A. It was the same note.

Q. Didn't you, from time to time, advance him some other moneys?

A. Never without his asking for it.

Q. Tell us what those amounts were.

A. I couldn't tell you. My books will show every dollar, but I cannot tell now.

Q. Have you them here?

A. Mr. Tener has them at the Mortgage Trust Company. They will give you every dollar, dates and everything. They were kept very correctly.

Q. Have you any idea of the aggregate, at the time of his death, of the other advances?

A. I cannot answer that.

Q. Was it as much as $100,000?

A. I think it might have been.

Q. You spoke, Mrs. Barcroft, of using that $135,000, or some of it, in taking up some bonds. What bonds were they?

A. Norfolk and Western Railroad Company, Baltimore and Ohio Railroad Company—there were three sets of bonds. I forget the other.

Q. With whom were those bonds?

A. He took them from me, and I don't know where they were.

Q. How did he take them?

A. He asked me for the loan of them.

Q. Do you remember when?

A. I think the Norfolk and Western was just about a year before his death, and the others were some time previous to that—a year or two. At the time of this note being drawn up there was, I think, a list that he had as to the Norfolk and Western bonds. The books will tell.

Q. At the time these advances were made to him did you take any obligation from him?

A. No, sir.

Q. How was it that you took the obligation for the $127,550 and did not for these?

A. I wanted a settlement with him for what he owed me—some arrangement made whereby he would be protected in his business and I would be protected, and I thought it was proper and right to do so. I came to see Mr. Bullitt, and he made all the arrangements. I wanted him to be protected in his business, and I might die, and I wanted my estate protected.

Q. But you have not told us how the indebtedness—how

did he become indebted in this way? Did he, in the first instance, borrow these bonds from you?

A. Yes, sir.

Q. When he borrowed them from you, what did you take from him to show that he owed them?

A. Nothing. I signed a paper giving him the power to use them. I remember that.

Q. Was that a written paper?

A. It must have been; yes, sir; I never had it.

Q. And were all of these bonds advanced to him on that paper?

A. Not on that one paper, but at different times, and on different papers.

Q. What became of the papers?

A. I cannot tell you. I never had them.

Q. Have you any idea what those bonds were pledged for, that you took up after his death?

A. I cannot tell you that, sir. I think Mr. Tener can tell you.

Q. How did you ascertain where those bonds were?

A. I can't tell you that.

Q. Who did ascertain it?

A. Mr. Tener.

Q. Weren't they in the hands of brokers?

A. I think so, sir.

Q. Had you loaned them to him for the purpose of pledging them with brokers?

A. No, sir.

Q. You were entirely ignorant of that use of them?

A. Yes, sir.

Q. You loaned him money to put in his business?

A. Yes, sir.

Q. And supposed that it was in his business?

A. Yes, sir.

Q. When did you find the contrary?

A. Not until after his death.

Q. Did you know, at any time, that he was speculating in stocks?

A. No, sir.

Q. You saw him pretty frequently up to the time of his death?

A. Almost daily. I could not tell how often, but two or three times a week.

Q. And that fact he never disclosed to you up to the last moment?

A. No, sir.

Q. Nor gave you any idea, of any sort or kind, that he had been doing it?

A. No, sir; and I had not the slightest suspicion of it.

Q. Do you remember many years ago he became involved in some difficulty owing to speculation in Jersey Central, where you helped him out?

A. I know nothing about it.

(Mr. Bispham objects to this and to the manner of question generally, with a reservation of the right to object to the disability of the witness, saving that such objection shall not be to the mere shape of the question.)

Q. Do you remember paying any money on William M. Runk's account after his death, to the Episcopal City Mission?

A. Yes, sir.

Q. How much was that?

A. $40,000.

Q. That was the amount which, as treasurer, he had embezzled, was it not?

A. I don't know how he got it.

Q. He had been the treasurer?

A. Yes, sir; and the report was that he had used that money.

Q. I take it for granted your intervention was simply to save his credit?

A. Yes, sir; himself and his family.

Q. Were there any other settlements which you made after his death in order to preserve his credit?

A. No, sir. Mr. Darlington and I agreed to indemnify the executor against loss if he would pay the small bills and the estate should prove insolvent.

Q. It was found, in this Episcopal City Mission, that he, as treasurer, had appropriated a certain amount of cash, and used

certain of their bonds, and you then agreed that you would pay them the amount that was due, and should take an assignment of their claim against the estate?

A. Yes, sir; that is correct.

Q. You presented at the audit a claim of $86,736 against the estate in the Orphans' Court. Do you remember that?

A. I saw that in the paper, but I don't know how it came about. It was so printed in the paper. I had not done anything like that. I went to Mr. Tener and he explained about it. I had only $40,000; not the whole amount.

Q. Do you remember what his explanation was, now?

A. They made it so as to cover up the City Mission. It was fixed with the court, or something of that kind, that it should not be that he owed the City Mission; that I had assumed it.

Examination of Mr. Tener, with the books:—

Q. Mr. Tener, tell us, please, how much Mrs. Barcroft got from the policies of insurance; how much she loaned Mr. Runk; the amount of bonds of hers he had pledged with the brokers and the dates at which she had loaned him these bonds.

(Mrs. Barcroft's books, as kept by Mr. Tener, are now produced at the suggestion of counsel, and she is allowed to refresh her memory and inform herself as to details therefrom, with his assistance.)

A. The books show that the amount received from insurance was exactly $135,000. October 11th, 1892, New York Life Insurance Company, $50,000; October 12th, 1892, from the Penn Mutual Life Insurance Company, $29,290.71. In explanation of the odd amount, there was some reduction, I think, of a premium note against it. November 8th, from the Northwestern Life Insurance Company, $45,109.80; November 11th, from the State Mutual Life Insurance Company, $10,000; amounting in round figures to $135,000.

Q. Now, I wanted to see how much of that money was paid, and when and to whom in taking up her bonds, which had been pledged with brokers.

A. On November 11th, Mrs. Barcroft paid the Beneficial

Saving Fund Society $10,167.50 to redeem $10,000 bonds of the Baltimore and Ohio, which I understand she had loaned Mr. Runk.

Q. They were pledged with the Beneficial Saving Fund Society on Mr. Runk's note, of course?

A. Yes, sir; as collateral security.

By Mr. Bispham:

Q. Do your books show the date when the bonds were pledged?

A. No, sir.

By Mr. Johnson:

Q. It will show the date of Runk's note?

A. No, sir.

Q. Do the books show what the amount of Runk's note was?

A. No, sir; we just simply relieved the bonds for the amount that they had charged against them. In other words, we paid off the loan. On the same day, November 11th, 1892, paid the Philadelphia Saving Fund Society $17,353 for the purpose of redeeming $12,000 bonds of the Norfolk and Western, and $5000 bonds of the Camden and Atlantic Railroad Company, and $1000 City of Cincinnati, in all, $17,353. November 17th, paid to R. E. Tucker & Co., brokers, $2057.08 in redemption of $2000 of bonds of the Camden and Atlantic Railroad Company and $1000 Lehigh Valley Railroad Company. That seems to be about all.

Q. That would expend only about $29,410. The balance of the $135,000 must have been put into something.

A. When Mr. Runk went into business with Mr. Darlington, in 1878, Mrs. Barcroft loaned him $69,000 in money to make up his $100,000 share of the capital of that concern, and subsequently from time to time she loaned him from $28,000 to $30,000 additional, as he needed money. The $28,000 to $30,000 was not loaned at one time. There were loans from time to time upon which payments were made.

Q. Were these loans of $69,000 and $28,000 to $30,000 additional to the note of $127,550?

A. Which note do you refer to, Mr. Johnson?

Q. The note that Mrs. Barcroft took in 1890.

A. The note for $127,550 was taken in 1890, in settlement of all the advances up to that time.

Q. But what I wanted to see by the books was whether there was not paid out of this $135,000 that was got after Runk's death a larger amount than the $10,000, $17,000 and odd and $2000 and odd in taking up the bonds of Mrs. Barcroft's.

A. There was a balance of interest against him in this account of a little over $4000.

Q. He was that much back in his interest at the time of his death?

A. Yes, sir; that was only six months' interest on the whole indebtedness.

Q. I do not, of course, mean what Mrs. Barcroft took, which of course she had a right to in payment of the debt, but whether she did not use more than these three sums of that $135,000 in redeeming bonds of hers which Runk had pledged?

A. Not one dollar, and I may add in addition to that that there was a balance of $350.13 due her after all the insurance was paid.

By Mr. Bispham:

Q. That represented the total indebtedness of Mr. Runk to Mrs. Barcroft?

A. Yes, sir.

Q. That is, the $135,000 collected on the insurance policies, plus this balance of $350, represented the total of Mr. Runk's indebtedness to Mrs. Barcroft at that time?

A. Yes, sir.

By Mr. Johnson:

Q. Then how was this $86,736 made up, Mr. Tener?

A. On February 3d, 1893, Mrs. Barcroft issued her check for $35,000 to be paid to the Protestant Episcopal City Mission, and she took an assignment of the claim of the City Mission against the estate. On March 17th there was a further sum of $5000 paid in the same way, and again, the same day, $140.36. On December 27th, 1893, a still further sum of $859.62 was paid through Mrs. Barcroft's counsel to the City Mission. This makes a total of $40,999.98.

Q. She spent $40,000 out of her own account?

A. Yes, sir; they were her own. They had nothing to do with the City Mission.

Q. Her claim of $86,000 was composed partly of that?

A. The insurance paid for this. That is, her entire claim was made up a little short of $100,000 in money actually paid, and in money afterwards advanced to redeem the bonds and the interest. This first matter that we were speaking of had no connection with the City Mission.

Q. Didn't he owe the whole of that note, $127,550, at the time of his death?

A. Yes, sir; the $30,000 which Mrs. Barcroft loaned were part and parcel of that $127,000.

Q. These bonds, then, which were taken up at the Philadelphia Saving Fund, and the Beneficial Saving Fund and Tucker & Co.—these bonds thus taken up made up part of the $127,550?

A. Yes, sir.

Q. Well, then, there was upwards of $45,000 that was not included?

A. I have no knowledge whatever of the claim that was sent to the executor of the estate. I don't know how that was made up.

Q. Can you tell by the books when these bonds were loaned to Runk?

A. When they were loaned there was no entry made, but Mr. Runk afterwards gave Mrs. Barcroft a due bill, which is in her possession. That is in the Fidelity Company. It was six or seven years ago—six years at least.

Q. Who will know about that?

A. Mr. Ritter is very familiar with all the details of this claim.

Q. Mrs. Barcroft, after hearing what your books contain, and having your memory refreshed as far as these books will refresh it, you cannot give us any further explanation of how the claim of $86,000 was made up?

A. It was made up by the City Mission, and with life insurances paid in to the executor he was able to pay off that much,

$40,000 and odd. And then he came short—he expected to settle the whole amount.

By Mr. Tener:

As I understand, the $40,000 paid by Mrs. Barcroft to the City Mission testified to, was in addition to an amount of some $45,000 paid by the executor on account of the total claim, and Mrs. Barcroft, in order that there might be no claim against the executor for having thus paid it, assumed the entire amount.

Q. Of course, Mrs. Barcroft, during the lifetime of Mr. Runk you were in total ignorance of that shortage?

A. Entirely so. I knew he was the treasurer, but as for his using any of the money, I didn't know anything about it.

Q. Did you receive a letter shortly before the death of Mr. Runk, or immediately after, written by him?

A. Yes, sir.

Q. Have you that letter?

A. Yes, sir.

Q. Will you let me see it?

(Letter produced and read by Mr. Johnson.
Envelope addressed, "Mrs. M. A. Barcroft.")

"St. Davids, Pa.
"Llandeilo.

"My Dear Aunt Mary:—Forgive me for the disgrace I "bring upon you, but it is the only way I can pay my indebt- "edness to you. A. Howard Ritter will attend to all my af- "fairs with Evelyn. You have always told me my mind was "not strong. I have been led astray, have been infatuated "with speculation and lost. I worked too hard,—I am wild "but cannot recover now.

"Thank you for all you have been to me in every way. "Forgive.

"Affectionately,

"Tuesday, Oct. 6, '92." "WM.

Q. That was received by messenger?

A. The letters were laying in the house, and his wife took charge of them. She handed it to me.

Q. Of course you are aware that if the insurance policies are collected that this amount of $86,736 will all be recoverable by you?

A. Only the $40,000. The other has been paid out of the estate, if I understand right. He paid out of the estate, out of the insurance he received, all he could, and when he could not pay any more I saw proper to settle the thing up.

No cross examination.

Signature waived.

No. 142.

142

Appx to Br of Shaw & Johnson for D. C.

For the use of the Supreme Court in the case of Ritter, Ex'r of Rusk *vs.* The Mutual Life Insurance Company of New York—No. 142 of October Term, 1897.

Filed Dec. 17, 1897.

STATE OF ILLINOIS.

Appellate Court—Third District.

At an Appellate Court, begun and held for the Third District of the State of Illinois, at Springfield, on the third Tuesday in May Term, A. D. 1897.

Present—Hon. O. J. HARKER, Presiding Justice.
" J. J. GLENN, Justice.
" B. R. BURROUGHS, Justice.

Attest :
WM. C. HIPPARD,
Clerk.

To wit : On the 2d day of December, A. D. 1897, there was filed in the office of the Clerk of said Court an opinion of said Court, in the words and figures following :

Docket No. 60. May Term, 1897. Agenda No. 50.

Filed Dec. 2, 1897.

THE SUPREME LODGE KNIGHTS OF PYTHIAS OF THE WORLD,
Appellant,

vs.

HENRY J. KUTSCHER, Administrator of LOUISA M. HENRY, deceased,
Appellee.

Appeal from Sangamon.

Opinion of the Court.

BURROUGHS, J.:

This is an action of assumpsit, brought by the appellee Kutscher, as administrator of Louisa M. Henry, deceased, upon a certificate of membership, or policy of insurance, issued by appellant to one William C. Henry, who was the husband of Louisa M. Henry. For the sake of brevity, we will hereafter speak of said certificate, as a "policy."

The policy is in words and figures following: "Fourth class, $3,000.00. This certifies that Brother William C. Henry received the obligation of the Endowment Rank of the Order of Knights of Pythias of the World in Section No. 45 on July 1, 1889, and is a member in good standing in said Rank, and in consideration of the representations and declarations made in his applications, bearing date of June 4, 1889, and April 26, 1892, which applications are made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank, of all assessments as required, and the full compliance with all the laws governing

this Bank now in force, or that may hereafter be enacted by the Supreme Lodge Knights of Pythias of the World, or the Board of Control of the Endowment Rank, and shall be in good standing under said laws, the sum of $3,000 will be paid by the Board of Control of the Endowment Rank, Knights of Pythias of the World to Louisa M. Henry, his wife, as directed by said brother in his application, or to such other person or persons as he may subsequently direct, by change of beneficiary entered upon the records of the Supreme Secretary of the Endowment Rank, upon due notice and proof of death and good standing in the Rank, at the time of death, and surrender of this certificate. Provided, however, that the interest of any beneficiary as designated by said brother, or the interest of his or her heirs shall cease or determine in the case of the death of said beneficiary during the lifetime of such member, and in that case the benefit accruing under this certificate shall be paid as provided for in Article Twelve, Section One, of the Endowment Rank of the Constitution. Provided, further, that if at the time of the death of said brother the proceeds of one assessment on all members of the Endowment Rank shall not be sufficient to pay in full the maximum amount of endowment held under this certificate, then there shall be paid an amount equal to the proceeds of one full assessment on all remaining members of the Endowment Rank, less 10 per cent. for expenses, and the payment of such sum to the beneficiary or beneficiaries entitled thereto under the law shall be in full of all claims and demands under and by virtue of this certificate. And it is understood and agreed that any violation of the within-mentioned conditions or the requirements of the laws in force governing this rank, shall render this certificate and all claims null and void, and that the said Endowment Rank shall not be liable for the above sum or any part thereof.

IN WITNESS WHEREOF we have hereunto subscribed our names, and affixed the seal of the Supreme Lodge Knights of Pythias of the World.

Issued this 19th day of July, 1892, pp. XXIX, at Chicago, Illinois, and registered in Book 3, fol. 130.

On the 3d day of October, 1895, William C. Henry departed this life, having paid all assessments and performed all other conditions of said policy; and left surviving him his wife, Louisa M. Henry, who died before suit was brought, and leaving surviving her two children. Demand was made for payment of the sum specified in said policy, and an offer also made to surrender the same, but payment was refused. There being no controversy as to the sufficiency of the declaration, it is not necessary to set it forth with any degree of particularity. Various pleas, replications, rejoinders and demurrers were filed, some of which were afterwards withdrawn. These steps need not be herein stated except as to those pleadings which finally made up the issues.

The appellant filed the general issue (non-assumpsit) and issue was joined thereon. The appellant also filed two special pleas setting up that all the supposed causes of action in the declaration described are one and the same. That the appellant is a corporation organized for fraternal and benevolent purposes and for the mutual benefit of the members. The first plea also alleges that said William C. Henry was a member of Capital Lodge No. 14, and also a member of Section 45, and was subject to the constitution and rules, by-laws and regulations of the Endowment Rank Knights of Pythias of the World, and agreed to abide by all laws, rules and regulations of said Order, then in force or as the same might be thereafter adopted or amended.

The plea also alleges that on the 4th day of June, 1889, and on the 26th day of April, 1892, said Henry executed and presented to defendant his applications for membership in the Endowment Rank, which applications became part of the contract of insurance, and such applications are made parts of said plea. That by the terms of said applications it was provided as follows:

"I hereby agree that I will punctually pay all dues and assessments for which I may become liable, and that I will be governed and this contract shall be controlled by the laws, rules and regulations of the Order governing this Rank now in force or that may hereafter be enacted by the Supreme Lodge Knights of Pythias of the World, or submit to the penalties

therein contained, to all of which I freely and willingly subscribe."

The plea further avers that on the 13th day of January, 1893, the Supreme Lodge through its authorized Board of Control passed a law, rule and regulation for the government of members of the Endowment Rank in the words and figures following:

"If the death of any member of the Endowment Rank heretofore admitted into the first, second, third or fourth classes or hereafter admitted shall result from self-destruction, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics or opiates, or in consequence of a duel or at the hands of justice, or in violation or attempted violation of any criminal law, then in such case the certificate issued to such member and all claims against said Endowment Rank on account of such membership shall be forfeited."

The plea further alleges that at its annual session in the city of Washington in September, 1894, the Supreme Lodge adopted and ratified said law and the same became and was in force from and after its passage on January 13, 1893, as an amendment to the general laws of the Endowment Rank.

The plea further alleges that said William C. Henry came to his death by self-destruction, and that in accordance with the contract entered into said certificate became forfeited and void.

The defendant also filed a third plea, being the second special plea, in substance the same as the first with this exception. That the third plea alleges that said law, rule and regulation was adopted on the 13th day of January, 1893, by the Board of Control of the Endowment Rank without stating that the same was ratified or adopted by the Supreme Lodge.

Appellee filed replications as follows:

First replication to the third plea avers that the Board of Control had no power to pass the said law or regulation, and did not pass the same on the 13th day of January, 1893, or at any other time, and said certificate did not become void. This replication concluded to the country and issue was joined thereon.

Appellee's replication to the second plea is the same in substance as the foregoing with this difference only, that it denied that the Supreme Lodge adopted or ratified the rule or law in question. This replication also included to the country and issue was joined thereon.

Appellee also filed another or second replication to defendant's second plea, in which was averred that at the time when William C. Henry committed self-destruction "he was of unsound mind to the extent that he was not conscious of the moral or physical efforts of what he was doing, and that he did the same when in a fit of frenzied madness, when he had no ability to form an intention, and did not voluntarily and intentionally destroy himself." To this replication a rejoinder was filed by the appellant reversing the same, and alleging that William C. Henry did not commit said act while in a fit of frenzied madness, but did commit self-destruction voluntarily and intentionally. Issue was taken upon said rejoinder and trial had by jury.

Verdict for plaintiff for $3,000.

Motion for new trial.

Grounds of motion. The Court erred in excluding evidence from the jury, that the deceased Henry committed self-destruction as a result of mental disorder arising from present voluntary intoxication. Also excluding certified copies of proceedings and verdicts of coroner's inquest over the body of Henry and his wife. The Court erred in instructing to find the issue for appellee; also in refusing to give each of the four instructions offered by the appellant; the verdict was unsupported by any evidence; the Court erred in admitting improper evidence on the part of appellee; the Court erred in excluding from the jury each instruction, record or proceeding, rule or regulation embraced within the stipulation of the parties, the substance of which is contained in the next paragraph.

Before the trial counsel for the parties stipulated in writing that on the trial certain instruments, records, printed volumes and other documents should be admitted in evidence by either party. These included constitutions of the Knights of Pythias and of the Endowment Rank and proceedings of both bodies at various times; also the general laws of the Endowment Rank; also the application of William C. Henry, filed with

appellee's second plea, should be considered in evidence without further proof. It was, however, provided in said stipulation that the terms thereof were not to conclude either party as to the legal effect or legality of any of such evidence, but only render it easy of proof and evidence of what it purports to be on its face, by leaving its legal effect to be determined by the Court at the trial. There is no controversy whatever in this case as to the regularity of proof under said stipulation, only as to the effect of the evidence when admitted.

Appellee proved the death of William C. Henry and his wife Louisa afterwards, and that she left surviving her two children. Appellee also proved that William C. Henry paid up all his dues to the order, or they were paid on his behalf up to the time of his death. The daughter of the deceased parties testified that her father came home on the evening before her mother died about a quarter to five. Her mother was out riding when her father came home. On cross examination defendant's counsel asked witness "What happened after that?" Plaintiff objected and the Court sustained the objection. We may here state, in order to save time, that all rulings of the Court hereinbefore or hereinafter referred to were, at the time the same were rendered, excepted to by appellant.

It was proven by E. A. Baxter, Sheriff of Sangamon County, that he, being informed that Mrs. Henry was shot, went, about seven the next morning, to where William C. Henry's body was lying. Witness was called just after Henry shot his wife. Henry was dead. Right hand raised up. Revolver lying close by there and an open knife. Cut across the wrist.

In the testimony of Martha Horsch, it is shown that the deceased Henry was ordinarily a very intelligent man, and a good locomotive engineer, but something became wrong with him. Witness saw him one or two evenings before he died. He was under the influence of liquor. Mrs. Henry sent for witness. He was going to clean out the house. Witness found him on the floor and picked him up and put him to bed.

Charles Shriver testified also about occasional strangeness on the part of William C. Henry. Testimony in regard to the mental condition of Henry was given by George Hoffman, who was also employed by the Wabash Railroad. This man was very intimate with the deceased. Knew him thoroughly. His

strangeness arose from intoxication. When under the influence of liquor he was very quick tempered. Quarrelsome disposition, although he talked very good. He would talk and quarrel and witness knew when he was under the influence. Next day he would not remember anything and begged pardon. He was different from other drunk men. Would not talk heavy or stagger. He was not that way. He would walk straight and had a quarrelsome disposition about him. Liquor affected him differently from ordinary men. Had been discharged for drunkenness. Wanted to stop every place where a station was to get liquor. Wanted to fight every man on the train. This was several years before the company took him back. He knew how liquor affected him, and talked about it. Three or four months afterwards he was again drinking. Witness saw him in grocery three or four days before the killing. There was a saloon there. He was under the influence then. Could only know when these spells were on him by his quarrelsome disposition. He did not get off his legs or lose control of his body. Talked clearly but acted quarrelsome. Saw him in Elshoff's store three to five days before murder. Smell of liquor convinced witness he was drunk and said to him : "Bill, you have been drinking again." This made him mad, and he lost control of his temper. Witness glided away. Next day he apologized.

J. W. Asey, testified that he saw the body between six and seven on the fourth of October, 1895, probably dead some hours. Body stiff. Witness saw the man the night before. Just this side of where he found him. Probably fifty yards off. Passed very close to shock of corn. Looked up and discovered body. Witness had seen the man go behind the shock the night before, and in the morning he looked to see if the body was there. Right hand kind of up, resting his head partly on it. Pistol lying on the ground under where the hand stuck up. Saw a knife there. Think it was under his head. It was open. Wound in the temple like a pistol wound. Saw him go behind the shock the evening before about half-past six.

Defendant's evidence.

Defendant introduced under stipulation report of the Board of Control of the Knights of Pythias found in the record, and

proceedings of convention of Supreme Lodge 1893 and 1894, the session of 1894, having been held in Washington City, August 28th to September 8th, 1894. The report of the Board of Control set forth reasons why losses arising to the order from suicide should be guarded against. Gives reasons and sets forth that in the preceding fifteen months claims amounting to $63,000 arising out of suicides had occurred, and the safety of the mortuary fund was thereby in danger. Also that the Board had amended the laws providing that in the event of self-destruction the certificate should be void. To that end the said Board on January 12th and 13th of 1893 had amended Section 1, Article VI. of the general laws by adding to the end of said section as follows: "the new law, rule or regulation thus here set forth has been already given in full in the pleas of the defendant, and need not be repeated."

It was referred by the Supreme Lodge to Committee on Endowment Rank. The reports of the Committee on Endowment Rank were taken from the table and adopted. The appellee also introduced the law as adopted by the Board of Control in the revised edition of the general laws, March 1st to 18th, 1894, being the same law hereinbefore referred to. The law last referred to being offered by the appellant, the appellee objected, and the Court sustained the objection, so that the law in question was withheld from the jury.

Appellant introduced Section 9, Article VIII. of the constitution of 1890 of the Endowment Rank authorizing the Board of Control to enact laws, rules and regulations and to alter and amend the same. Also Section five, Article II. of the same constitution. It empowers the Board of Control to enact, alter and amend laws and regulations necessary to govern the same. Also the constitution of the Supreme Lodge of 1890, 1892 and 1894, and the constitution of the Endowment Rank. Constitution provides that the supreme body shall have power to establish an Endowment Rank and to create a Board of Control for the government thereof; that said Board shall have entire control of said Endowment Rank. Board empowered to grant warrants to establish sections of Endowment Rank and to enact, alter and amend all laws and regulations necessary.

Constitution of 1894, this constitution appears in the larger

pamphlet, and is made part of the record, the first page thereof being numbered at the foot 6955.

In Article Seven, Sections Fifteen, Sixteen, Seventeen and Eighteen on head, page 6961, special directions are given as to the methods of legislation to be pursued by the Order. Every proposition should be read three times on a different day; the majority of all members necessary to pass any proposition; all statutes to take effect after sixty days.

Appellee offered in evidence the two applications filed with plaintiff's pleas, one of them being the application on which policy sued on was issued. Appellant objected, and Court withheld ruling. Appellant called Louisa, daughter of William C. Henry, who formerly testified. Witness stated that she was at home on the evening of October 3, to which she had before testified. And then the following question was put to her: "If your father came home at that time, or about that time, you may tell the jury what happened there in your presence." Appellee objected, and the Court sustained the objection, and refused to permit the evidence to go to the jury. Appellant then offered in evidence the verdict of the coroner's jury in the cases of both of the deceased, the wife, Louisa M. Henry, and her husband, William C. Henry. Verdicts, in substance, are as follows: As to the wife, that she came to her death by a revolver wound fired by her husband, William C. Henry, while under the influence of liquor. As to her husband, that he came to his death by a revolver shot. Both verdicts were objected to by appellee. Objections sustained by the Court; appellant rested.

By way of rebuttal, appellee introduced charter of Supreme Lodge of August 5th, 1890, as follows: "That the following additional section, to be known as section nine, be added to the act of incorporation as amended, viz.: 'That the Supreme Lodge shall have power to establish the uniform rank and the Endowment Rank upon such terms and conditions and governed by such order and regulations as to the said Supreme Lodge may seem proper.'"

Appellee also introduced the report from the committee on Endowment Rank of nineteenth convention, 1895, reporting that, under the constitutution of 1894, the Supreme Lodge had no power to delegate to another body the right to legislate

on any subject, and that such action, if taken, is null and void, and recommending the enactment by the Supreme body of the suicide law in question.

Thereupon the court, on motion of the appellee, excluded all evidence offered by the appellant of the acts and proceedings of the Board of Control, of the Endowment Rank and the Supreme Lodge, and the constitution of 1890, 1892 and 1894; and the court also excluded the application offered in evidence.

The appellant asked the court to give the jury the following instructions:

1. The plaintiff in this case admits that the deceased, William C. Henry, committed self-destruction, and the defendant is not required to prove this fact.

2. If the jury believe from the evidence that the deceased committed self-destruction by reason of mental derangement occasioned by existing voluntary intoxication, then such act is not excusable because of insanity, and the plaintiff cannot recover in this action.

3. The jury are further instructed that the law presumes every man to be sane until the contrary be proven, and the burden of making such proof rests upon the party alleging such insanity. And the fact of committing self-destruction does not of itself establish the insanity of such person.

4. The jury are instructed that if they believe from the evidence that the deceased William C. Henry, committed self-destruction while in a sane condition, then they will find for the defendant without regard to any rule or law adopted by the Board of Control, or by the Supreme Lodge or claimed to be so adopted.

But the Court refused to give said instructions and thereupon the Court gave the jury the following instructions :

" The Court instructs the jury to find the issues for the plaintiff and to assess his damages at the sum of $3,000, and the form of your verdict may be : We, the jury, find the issues for the plaintiff and assess his damages at the sum of $3,000."

Thereupon the jury found a verdict for the appellee, and the appellant file d its motion for a new trial. Motion overruled and judgment on verdict for $3,000.

From the exceptions taken, and the errors assigned on this record the legal questions presented, upon which the merits of this case rest, are: *First*—If William C. Henry committed self-destruction while sane, did that fact avoid the policy? Second—Did the stipulation, set forth on the face of the policy, authorize the "Board of Control of the Endowment Rank" of appellant, to adopt the rule, law or regulation providing that all policies should be void in case the assured committed self-destruction, whether sane or insane, so as to make it apply to the policy sued on in this case?

As to the first question above stated, we think the law is, that where a policy contains no provisions making suicide or self-destruction, by the assured, a forfeiture of the policy; and also makes the indemnity under it payable to some one other than the assured, or his personal representative, then intentional self-destruction by the assured, while he is sane, does not avoid the policy. But, where such a policy is by its terms payable to the assured or his personal representative, then intentional self-destruction, while sane, will avoid the policy. (Northwestern Benevolent and Mutual Aid Ass'n *vs.* Barbara Wanner, 24 Ill. App., 357.)

The reason why the *estate* of a sane man, who takes his own life intentionally, cannot recover is that to so permit would enable a man by his own wrongful act to have his estate make a profit thereby.

As to the *second* question presented we will say that from the evidence in this record it does not appear that the Supreme Lodge did, before the death of William C. Henry, adopt the law, rule or regulation for the government of members of the Endowment Rank in the words and figures following: "If the death of any member of the Endowment Rank heretofore admitted to the first, second, third or fourth classes, or hereafter admitted, shall result from self-destruction, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics or opiates, or in consequence of a duel or at the hands of justice, or in violation, or attempted violation, of any criminal law, then in such case the certificate issued to such member and all claims against said Endowment Rank, on account of such membership, shall be forfeited." As by its plea it had averred.

But it does appear from the evidence that the Board of Control of the Endowment Rank, of appellee (which Board of Control, from the evidence, was the Board that supervised the business of the insurance department of appellant) before the death of William C. Henry, and after the issuance of the policy sued on in this case to him, did what they could do, to enact said law, rule or regulation above mentioned. But we hold that said Board of Control was but an agency of appellant, to whom appellant could not delegate its legislative functions to enact a law that would inject into the policy sued on, a provision making suicides, &c., avoid it. See Supreme Lodge Knights of Pythias of the World *vs.* LaMalta, 31 Southwestern Reporter 493, decided by the Supreme Court of Tennessee, which is a case just like this, and we fully concur in the decision, as well as the reasoning of that Court, as set forth in its opinion in that case.

It is contended, however, by appellant, that the policy sued on reserved the power of legislation to the Board of Control as well as the Supreme Lodge, and action, by either of those bodies, was ample under the express consent of the deceased.

But we think the language used in the policy sued on to-wit: "The full compliance by the assured with all the laws governing this rank, now in force, or that may hereafter be enacted, by the Supreme Lodge Knights of Pythias of the World, or the Board of Control of the Endowment Rank," could not be construed to confer legislative function upon the Board of Control, the mere agency of appellant, to the extent of changing the contract of insurance sued on, and injecting conditions therein by which the same might become void, the legislative function restricted by the constitution of appellant to appellant itself.

It being a well-understood rule of law that forfeitures are not favored in law, and will not be enforced, except where the acts which would make a forfeiture, are clearly shown.

Inasmuch therefore as the record in this case discloses, that the trial Court held correctly in its rulings on the evidence, instructions to the jury and in its judgment; we affirm its judgment herein.

AFFIRMED.

I, WM. C. HIPPARD, Clerk of said Appellate Court, do hereby certify the foregoing to be a true copy of the opinion of said Court in said cause, as the same appears from the records and files of my office.

[SEAL] IN TESTIMONY WHEREOF, I hereunto set my hand and the seal of said Court at Springfield, this 9th day of December, 1897.

WM. C. HIPPARD,
Clerk Appellate Court.